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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 RUDOLPH ROYBAL,

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13 Petitioner,

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15 vs.
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18 RON DAVIS, Acting Warden of the
19 California State Prison at San Quentin,

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21 Respondent.
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Case No. 99cv2152-JM (KSC)

DEATH PENALTY CASE

ORDER:

**(1) DENYING PETITIONER'S
REQUEST FOR AN EVIDENTIARY
HEARING AND/OR DISCOVERY ON
CLAIMS 4-8, 10-11, 25-27, AND 29-31;**

**(2) DENYING RESPONDENT'S
REQUEST TO DISMISS CERTAIN
CLAIMS ON THE BASIS OF STATE
PROCEDURAL BARS;**

**(3) DENYING HABEAS RELIEF ON
CLAIMS 1-8, 10-11, AND 13-38 IN THE
FIRST AMENDED PETITION; AND**

**(4) GRANTING HABEAS RELIEF
ON CLAIMS 9, 12, AND 39 IN THE
FIRST AMENDED PETITION**

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On June 17, 2013, Petitioner filed the First Amended Petition [“FAP”] and filed a motion for leave to file the FAP on August 1, 2013. (ECF Nos. 215, 220.) After briefing on issues discussed in more detail below, on December 16, 2013, the Court granted Petitioner’s motion. (ECF. No. 240.) On February 14, 2014, Respondent filed an Answer [“Ans.”] to the FAP, and on April 15, 2014, Petitioner filed a Traverse. (ECF Nos. 241, 243.) On June 6, 2014, Petitioner filed a Request for an Evidentiary Hearing and Discovery on Claims 4-8, 10-11, 25-27 and 29-30¹ in the FAP. (ECF No. 249.) On June 25, 2014, Respondent filed a Response. (ECF No. 250.) On September 4, 2014, Petitioner filed a Reply. (ECF No. 264.) The Court held oral arguments on April 22, 2015. The parties also submitted supplemental briefing on the impact, if any, of Davis v. Ayala, 576 U.S. ___, 135 S.Ct. 2187 (2015), on the Court’s consideration of Petitioner’s claims. (See ECF Nos. 278-81.)

For the following reasons, and based on the arguments presented in the written pleadings and at oral argument, the Court **DENIES** Respondent’s request to dismiss certain claims on the basis of procedural default, **DENIES** Petitioner’s request for an evidentiary hearing and/or discovery on Claims 4-8, 10-11, 25-27, and 29-31, **DENIES** habeas relief as to Claims 1-8, 10-11, and 13-38 in the FAP, and **GRANTS** habeas relief as to Claims 9, 12, and 39 in the FAP.

I. PROCEDURAL HISTORY

On July 21, 1992, a San Diego County jury found Petitioner guilty of first-degree murder in violation of California Penal Code section 187(a), first-degree robbery in violation of Cal. Penal Code section 211, and first-degree burglary in violation of Cal. Penal Code section 459, in the death of Yvonne Weden. (Clerk’s Transcript [“CT”] 2506-09.) As to each offense, the jury found true that Petitioner personally used a knife, that he inflicted great bodily injury on the victim, and that the victim was a person 60 years of age or older. (Id.) The jury also found true two special circumstances, murder in the commission of a robbery and murder in the commission of a burglary. (Id.) On

¹ In the Traverse, Petitioner requested an evidentiary hearing on Claim 31. (See Traverse at 115.)

1 August 24, 1992, the jury sentenced Petitioner to death. (CT 2534-35.) The trial court
2 denied Petitioner's motion for a new trial and sentenced him to death on October 20,
3 1992. (CT 2536-37.)

4 On January 24, 1996, attorney Barry Morris was appointed by the California
5 Supreme Court to represent Petitioner on direct appeal and on state habeas proceedings.²
6 The California Supreme Court affirmed Petitioner's conviction and sentence on
7 November 12, 1998. See People v. Roybal, 19 Cal. 4th 481 (1998). On January 13,
8 1999, the California Supreme Court denied the petition for rehearing. After one
9 extension of time, a petition for writ of certiorari was filed in the United States Supreme
10 Court on May 13, 1999, which was denied on October 4, 1999.

11 On October 5, 1999, Petitioner filed a motion for appointment of counsel in this
12 Court. On December 14, 1999, the Court appointed Elizabeth Barranco and Russell
13 Babcock as federal habeas counsel. On September 29, 2000, federal counsel Barranco
14 and Babcock timely filed a federal habeas Petition. The federal Petition contained a
15 footnote indicating in part that, "[p]ursuant to the ruling of this Court on June 30, 2000,
16 petitioner alleges herein only those claims previously exhausted in the courts of the State
17 of California. Petitioner intends to file a subsequent petition in this Court should claims
18 which have not yet been adjudicated in the courts of the State of California be denied in
19 that forum." (ECF No. 25 at 1, fn.1.) Respondent filed an Answer to the federal Petition
20 on October 27, 2000, and on May 2, 2001, Petitioner filed a Traverse. Further
21 proceedings surrounding efforts to file a state habeas petition, and events surrounding
22 the destruction of records in Petitioner's case, are recounted in the Court's prior Order
23 granting Petitioner's motion to file an amended petition (see ECF No. 240), and resulted
24 in the removal of initial federal habeas counsel and the appointment of current counsel.

25 On March 12, 2004, attorneys John Lanahan and Elizabeth Missakian were
26

27 ² As discussed in greater detail in the Order granting Petitioner's motion to file an
28 amended petition (see ECF No. 240), in December 2001, the California Supreme Court
granted permission for Morris to withdraw as state habeas counsel and appointed
Elizabeth Barranco and Russell Babcock as concurrent state habeas counsel.

1 conditionally appointed as federal habeas counsel, subject to their concurrent
2 appointment as state habeas counsel. On July 1, 2004, Babcock moved to withdraw as
3 state habeas counsel and on August 30, 2004, Lanahan and Missakian moved for
4 appointment as state habeas counsel. On September 29, 2004, the California Supreme
5 Court removed Barranco as state habeas counsel and noted that: “Barranco is hereby
6 referred to the State Bar of California for appropriate disciplinary proceedings in light
7 of her abandonment of her condemned client.” (Case No. S029453 at
8 <http://www.courts.ca.gov/supremecourt.htm>.) Also on September 29, 2004, the
9 California Supreme Court granted Babcock permission to withdraw as counsel, and
10 appointed Lanahan and Missakian as state habeas counsel. On October 29, 2004, the
11 Court converted the conditional appointment of Lanahan and Missakian to an
12 unconditional appointment and relieved Babcock of further representation in Petitioner’s
13 federal habeas case.

14 On October 1, 2007, Petitioner filed a state habeas petition in the California
15 Supreme Court in Case No. S156846. On April 28, 2008, Respondent filed an Informal
16 Response, and on December 23, 2008, Petitioner filed an Informal Reply. On January
17 3, 2013, the California Supreme Court denied the state habeas petition.

18 On January 17, 2013, this Court held a status hearing and later issued a briefing
19 schedule, setting a deadline for filing the amended petition and a motion for leave to
20 amend the petition, on or before June 17, 2013. On June 17, 2013, Petitioner filed the
21 FAP, the operative pleading in this action. After a July 12, 2013 status hearing, the
22 parties agreed upon, and the Court ordered, a revised briefing schedule. Petitioner filed
23 a Motion for leave to amend the petition on August 1, 2013. Respondent filed an
24 Opposition on September 16, 2013, and on November 1, 2013, Petitioner filed a Reply.
25 On December 16, 2013, the Court granted Petitioner’s motion. On February 14, 2014,
26 Respondent filed an Answer to the FAP, and on April 15, 2014, Petitioner filed a
27 Traverse.

28 On June 6, 2014, Petitioner filed a Memorandum [“Pet. EH Mem.”] in Support

1 of the Request for Evidentiary Hearing and Discovery, requesting an evidentiary hearing
 2 and/or discovery on Claims 4-8, 10-11, 25-27, and 29-30. On June 25, 2014,
 3 Respondent filed a Response [“Resp. to EH Mem.”] to Petitioner’s Statement Regarding
 4 Evidentiary Development. On September 4, 2014, Petitioner filed a Reply [“EH
 5 Reply.”].

6 II. TRIAL PROCEEDINGS

7 The Court refers the parties to the statement of evidence issued by the California
 8 Supreme Court in Roybal, 19 Cal. 4th at 495-502. The California Supreme Court’s
 9 factual findings are presumptively correct and entitled to deference in these proceedings.
 10 See Sumner v. Mata, 449 U.S. 539, 545-47 (1981).

11 To provide context to the Court’s discussion of the claims in the FAP, particularly
 12 the claims asserting ineffective assistance of counsel, restated below is the California
 13 Supreme Court’s summary of evidence and testimony presented during the guilt and
 14 penalty phase proceedings.

15 A. Guilt Phase

16 The People introduced evidence to the following effect.

17 In 1989, Yvonne Weden lived with her husband, Paul, in Oceanside.
 18 She was 65 years old and suffered from arthritis and loss of hearing and
 19 was using crutches because of an injury to her ankle. Paul worked nights at
 20 a supermarket; Yvonne usually went to bed around 11:30 p.m. and awoke
 early. She did not smoke; Paul had quit smoking in January. Even when he
 smoked, he did not do so in the house; he usually smoked Marlboro brand
 cigarettes, never Camel brand.

21 Defendant had lived in Santa Fe, New Mexico, with his mother for
 22 most of his life. In April or early May 1989, he lived with his half brother,
 23 Frank Orozco, and the latter’s family in Oceanside, about a half-mile from
 the Weden home. He was not permitted to use the car, but he was able to
 use his brother’s bicycle. He smoked Camel brand cigarettes. He earned
 24 money doing yard work in Oceanside and helped in his brother’s business.

25 In May 1989, defendant came to the Wedens’ home and offered to do
 yard work, leaving his name and telephone number on a slip of paper. He
 26 was hired to perform yard work, mostly pulling weeds, for four days in late
 May. He stopped working for the Wedens when Paul became dissatisfied
 27 with the slowness of the work. The slip of paper with his name and
 telephone number remained pinned to a bulletin board in the den.

28 On Thursday, June 8, defendant knocked on the door of the Wedens’

1 neighbor, asking for gardening work. The neighbor, who described him as
2 appearing aggressive and nervous, did not hire him. The following day,
3 Friday, June 9, he sought work at the home of another Oceanside resident,
4 leaving his name and telephone number.

5 On June 9, at 7:45 p.m., Paul left the house. He finished work at 7:30
6 a.m. on June 10, went out for a "couple of beers" with some coworkers, and
7 then, at 8:00 a.m., drove to pick up a new gardener but was unable to locate
8 him. When he returned home, he was unable to open the garage door, his
9 usual entry into the house. When he entered the house, he found his wife
10 lying on the floor of the bedroom in her pajamas; there was blood on the
11 wall and her body was cold. He called 911 around 8:30 a.m.

12 The front door was unlocked and there was no sign of a forced entry.
13 The slip of paper with defendant's name and telephone number was
14 missing. A Camel brand filter cigarette butt was on the floor of the guest
15 bedroom.

16 A jewelry box containing Paul's wedding ring, some Masonic rings,
17 and other items, was missing from the master bedroom. The outer box in
18 which it had been kept had a blood smear or stain on it. Some of Yvonne's
19 jewelry was missing, including gold chains and costume jewelry, as was
20 some cash. A pistol and holster were missing from a dresser.

21 The police arrived. Yvonne was pronounced dead at the scene. There
22 was a bloody laceration around her neck and blood on her pajamas, the
23 walls, and the carpet. Her wedding ring was missing from her finger.

24 She died from multiple stab wounds. The coroner estimated the time
25 of death as occurring between midnight and 2:00 a.m. An autopsy showed
26 blunt force injuries to her head and multiple stab wounds to her chest,
27 shoulder, hands, and neck. The stab wounds were deep; there was a jagged
28 gaping wound to the neck, and multiple punctures of the lungs, and a rib
was fractured by the force of the knife. There were wounds and blood on
the palm of her left hand. It was difficult to obtain fingerprints from the
hand, because the fingers were clenched.

On the night of June 9, defendant telephoned his mother, Stella
Orozco, in New Mexico. He left Oceanside for New Mexico on June 10,
around 10:00 p.m., arriving on June 11. When she asked about cuts on his
face, he said he had been injured in a robbery earlier the same week or the
week before.

Later, she saw him take a plastic produce bag from her kitchen, go
into the backyard, and place it in one of the cinder blocks on top of the wall
between her yard and that of neighbors. The day after he arrived, he offered
to sell some jewelry to his half sister, Theresa Romero, who lived next door.
Theresa called the probation department the next day and told a probation
officer that defendant was staying at their mother's house, and that he was
selling jewelry.

On June 13, Theresa led police to the back room of Stella's home,
where defendant was watching television. In the course of a patdown
search, police discovered a small folding knife in his pocket. They also
found hypodermic syringes in his sock and marijuana in his pocket. He had

1 a packet of Camel brand filter cigarettes in his shirt pocket. Before he was
2 taken into custody, he left a gold rope chain in the room; as he was
3 removing articles from his pocket to leave behind, a foil packet containing
4 tar heroin fell to the ground. Defendant told police he had been in Seattle
for months and had returned to New Mexico to visit his ailing mother; he
did not mention that he had been living in Oceanside.

5 After the police left, Theresa learned from Stella that defendant had
6 hidden something in the wall "right in between everyone's yard." She
7 telephoned the police to say that Stella wanted to turn over some items, and
8 they returned that evening. Stella told them that she wanted them to remove
9 things that were not hers; she gave them several articles, including a folding
10 knife, and asked them to remove the plastic bag that defendant had placed
11 in her backyard wall. The police saw a portion of a plastic bag protruding
from a hole in a cinder block. They removed what proved to be two plastic
produce bags with green writing on them, containing a paper bag from a
Santa Fe drug store. The bags contained jewelry, later identified as
including rings and other items belonging to Paul and Yvonne Weden.
Stella also gave police a folding knife in a black sheath. They asked her for
the gold rope chain he had left behind; she said "Absolutely" and also gave
them some of his soiled laundry from the washing machine.

12 Detective Sheila Hancock, who was investigating the possibility that
13 defendant was involved in the Weden crimes, contacted Santa Fe police to
14 report the homicide in Oceanside involving theft of jewelry. She flew to
New Mexico on June 13, and searched the residence of Stella Orozco. She
also saw defendant at the police department; she noticed he was smoking
Camel brand cigarettes.

15 Several items, including the cigarette butt, a dinner knife, a jewelry
16 case, a sock, and knives, were tested at the Serological Research Institute
17 in Richmond, California. Both Yvonne Weden and defendant had the same
18 blood type and were both secretors; their blood tested differently in only
19 three genetic markers tested. Researchers at the institute examined the
20 saliva on the cigarette butt using polymerase chain reaction (PCR) DNA
21 testing. An employee of the institute was of the view that bloodstains from
the knife and sock, as well as saliva from the cigarette butt, could have
come from defendant, Yvonne Weden, or others with the same DNA
characteristics. There were no identifiable fingerprints on the cigarette butt.
Blood on the jewelry box had the same blood type as defendant and Yvonne
Weden. Microfibers similar to fibers from Yvonne Weden's pajamas were
found on defendant's socks and sweatshirt.

22 A partial print in "orangish-red," possibly blood, was found on a
23 metal doorjamb to the utility room of the Weden residence. Photographs
24 were taken of it, and an attempt was made to lift a fingerprint; the doorjamb
was thereafter removed at Detective Hancock's direction for further testing.
Attempts were made by an expert to obtain a usable print from the
25 doorjamb, but were unsuccessful. Thereafter, the doorjamb, which was kept
26 after the testing in a locked evidence area in Oceanside, was found to be
missing.

27 For his part, defendant introduced evidence as follows.

28 On the evening of June 9, both Frank Orozco and his wife were out,
and defendant was supposed to watch their children. When Frank returned

1 home, he found defendant "completely and totally inebriated, drunk to the
2 point that he was falling down." This was the first time he had found him
3 drunk at his home. He picked defendant up and led him to the bedroom. His
wife was angry and they discussed asking defendant to leave. He checked
on defendant an hour later; defendant had "passed out."

4 On June 10, he awoke defendant around 7:00 or 8:00 a.m. by shaking
5 him. Defendant asked, "What's wrong? What's wrong?" Frank and his wife
6 argued with defendant about his drinking. Defendant complained that
7 Frank's wife was treating him "like a slave" and stated that he wanted to
return to Santa Fe. That evening, Frank drove him to the bus depot for the
trip to Santa Fe, and gave him money for the ticket and food.

8 A forensic pathologist estimated that Yvonne Weden had been
9 murdered as early as 8:00 p.m. on June 9 or as late as 4:00 a.m. on June 10.
10 A police detective recalled that he was asked to take defendant's
11 fingerprints and compare them with prints collected at the crime scene,
12 including the doorjamb; he recalled being told there was no match. A
fingerprint expert was of the view that the print on the doorjamb was of a
finger or thumb, rather than a palm; he was unable to exclude the victim as
the maker of the print because of the poor quality of the prints that were
taken from her.

13 Another fingerprint expert concluded that the print on the doorjamb
14 could have been left by someone wearing surgical latex gloves; similar
15 gloves appeared in a photograph taken after the crime of a trash can outside
16 the side door leading to the Wedens' garage. But he could not tell by
17 looking at the photograph of the print on the doorjamb whether the person
who left the print was wearing gloves. Emergency personnel from the
Oceanside Fire Department testified that it was standard procedure to wear
latex gloves, but they were not usually disposed of at a crime scene. A
resident of Oceanside who had hired defendant to do yard work in the
spring of 1989 did not remember seeing him use gloves.

18 A newspaper delivery girl and her father drove past the Wedens'
19 house on June 10, about 6:30 a.m., and noticed two cars in the street near
the driveway.

20 B. Penalty Phase

21 The People presented evidence in aggravation to the following effect.

22 Defendant was convicted of six prior felonies in New Mexico, for
23 larceny, auto burglary, shoplifting, attempted residential burglary, and
burglary. He was also involved in four violent incidents in New Mexico.

24 On September 15, 1976, at 10:30 in the evening, Santa Fe Police
25 Officer Robert Guillen attempted to stop defendant's car, which had jumped
26 the curb. Defendant sped away and was followed, in a high-speed chase,
27 through residential areas of the town. Defendant pulled up to his mother's
28 house. A passenger in his car fired several gunshots at Officer Guillen;
defendant backed his car into Guillen, causing Guillen to hit the hood of his
patrol car. Another police officer chased defendant, who fled into his
mother's house and hid under a bed. After he was pulled out from under the
bed, he broke away and attempted to hide behind his mother to avoid arrest.

1 On July 23, 1982, Curtis Bruce encountered George Cervantes near
2 a store in Santa Fe. An argument ensued about \$2 Cervantes owed for
3 marijuana cigarettes. After an exchange of pushes, Bruce ran toward the
4 store. Cervantes and three others, including defendant, followed and a fight
5 ensued. During the fight, defendant sprayed Bruce's arm, neck, and face
6 with silver paint. Someone stabbed Bruce; he managed to flee. Defendant
7 was arrested carrying a can of spray paint and two marijuana cigarettes. It
8 was the same kind of paint defendant would ordinarily "sniff" in order to
9 become "high."

10 On June 15, 1985, the Santa Fe police, including Officer Joseph
11 Lopez, were telephoned by Stella Orozco about a domestic dispute; she
12 wanted defendant to leave her house after he threatened her with a knife.
13 Officer Lopez found defendant in the bedroom and told him that Stella
14 wanted him to leave. Angry and intoxicated, defendant responded with loud
15 cursing, but eventually was persuaded to leave. As he left the house, he
16 swore at the police and started coming toward the officers. He resisted
17 arrest, trying to hit them. He was carrying a container of marijuana in his
18 pocket.

19 On May 11, 1986, Carmen Annette Pacheco, who identified herself
20 as defendant's former girlfriend, went to a Mother's Day dinner with Stella
21 Orozco and Theresa Romero. After she dropped them off at home, she
22 bought two glass bottles of water, for herself and defendant, and went to
23 find him in a park. He had "round, blank, scary eyes" and was "high." He
24 grabbed the bottles, then attacked her, hitting, punching, kicking and
25 throwing her to the ground. She deliberately broke the bottles so he could
26 not use them in his attack. She yelled for help and was assisted by her sister
27 and two friends, who were driving by. Later that evening, defendant told
28 police that "someone had beaten the fuck out of him." They took defendant
to the hospital, where Pacheco was also being treated. She declined to press
charges and subsequently saw him a few times. Defendant did not
remember hitting Pacheco and did not apologize.

As to the murder of Yvonne Weden, the autopsy physician testified
that it involved a struggle and numerous stab wounds inflicted over several
minutes. There were abrasions on her face and stab wounds to her lungs,
armpit, abdominal cavity, windpipe, and a large artery. Several wounds
were inflicted while she was no longer moving.

In mitigation, defendant introduced evidence relating to his
background and character.

Stella Orozco left school in the third grade and did not learn to read
or write. She spent the ages between 13 and 19 first in a convent and then
in a reform school in New Mexico. She then worked in California, returning
at age 20 to New Mexico, where she married John Orozco. They lived in a
one-room house built by her husband, without water or utilities. He could
not have children because "he was sterilized or something." They adopted
a son, Frank. After John began "gambling and going out on" her, she
became pregnant, with defendant, by another man. She offered to give
defendant away if John would remain with her, but then decided to keep
him. John divorced her before defendant was born and did not return; her
mother, who had been living with her, also left.

Stella drank alcohol while she was pregnant with defendant. When

1 he was 18 months old, defendant fell from his crib and broke his front teeth;
2 his aunt took him to the hospital, but his mother refused to come.

3 Stella was "basically" a "prostitute" when she was not living with a
4 man. The family was poor. She later lived with a truck driver for three years
5 and bore his child, Ralphie. She had another child, Theresa, with Dewie
6 Brazfield, a heavy drinker who beat her every weekend and burned her with
7 a hot knife. He also hit defendant and the other children. Frank, who lived
8 on and off with his grandmother, finally joined the Marines to get away
9 from home.

10 Defendant was nicknamed "Mojo" or "Mojado"-Spanish slang for
11 "wetback"-by Stella. She did not show him affection, as she did the other
12 children; she never praised him or told him that she loved him. He was a
13 difficult child and frequently truant from school. At one point, he was left
14 alone with his brother Ralphie and began drinking alcohol. He also sniffed
15 paint. By the time he was 21, he had been involved in several drug
16 programs. Stella did not accompany him.

17 Two former employers testified that defendant was a dependable
18 employee.

19 Defendant also presented testimony concerning his drug and mental
20 problems.

21 Lucie Madrid, a certified alcohol counselor, met defendant in 1976
22 through a residential alcohol treatment program and became his counselor.
23 He participated in the program over a 10-year period. He was "deep in the
24 disease of alcoholism" and had "very little" self-esteem. Once, Madrid
25 found him crying in a park; he described himself as a failure who was
26 unable to make a different life for himself. Madrid, herself a recovering
27 alcoholic, explained that, like defendant, she sometimes had blackouts, for
28 as long as eight days.

Nan Busby knew defendant from Seadrunar, a drug and narcotics
treatment center in Seattle, which he attended from June 1987 until
February 1989. She described him as shy and withdrawn at first, but
eventually more expressive about his feelings. He had several relapses
during the program and left the aftercare program after four days.

James Blackmer, a judge and former prosecutor, prosecuted
defendant in 1986 for four pending felony cases. Defendant pleaded guilty
to charges including auto burglary, shoplifting, attempted residential
burglary, and burglary. After he was evaluated by the New Mexico
Department of Corrections, he was sentenced to a term of eight years, six
months, which was suspended on the condition that he enter a residential
drug program. He enrolled at Seadrunar, which Blackmer described as
"often tougher than going to prison."

Timmen Cermak, M.D., a psychiatrist, evaluated defendant and his
family. He found that defendant had significant impairment from brain
dysfunction, a schizoid personality structure, and was profoundly
chemically dependent since age nine, resulting in disruption of his
personality development. Intelligence testing indicated organic-based
learning disabilities. Cermak considered it likely that defendant had organic
brain damage, possibly the result of fetal alcohol effects, but did not believe

1 he met the criteria for diagnosis as an “anti-social personality.” Defendant
 2 also suffered “psyche numbing” as the result of physical and emotional
 3 abuse. He experienced memory blackouts since the age of nine, when he
 4 starting sniffing glue and using alcohol. Regarding the time of Yvonne
 5 Weden’s murder, defendant told Dr. Cermak that he took drugs on
 6 “Thursday” and “the next thing he remembered was getting off the bus in
 7 Santa Fe.” He said that he had “absolutely no idea how he got the jewelry.”

8 In rebuttal, the prosecution presented the testimony of Steven Bucky,
 9 Ph.D., a clinical psychologist. Bucky reviewed Dr. Cermak’s report and a
 10 videotaped interview of Stella Orozco but did not personally interview
 11 defendant or his family and did not review the trial testimony of Stella or
 12 Frank Orozco. In his opinion, defendant had a long-standing
 13 multi-polysubstance abuse problem and a personality disorder “closely
 14 aligned to an anti-social personality disorder.” He disputed Dr. Cermak’s
 15 conclusions that defendant’s alcoholism was genetic and that defendant
 16 suffered from a schizoid personality or posttraumatic stress syndrome. It
 17 was his view that defendant suffered from a “mild, subtle brain
 18 dysfunction” caused by substance abuse.

19 Roybal, 19 Cal. 4th at 495-502.

20 **III. PROCEDURAL MATTERS**

21 **A. Procedural Default**

22 Generally, when a state court’s rejection of a federal claim “rests on a state law
 23 ground that is independent of the federal question and adequate to support the
 24 judgment,” a habeas petitioner has procedurally defaulted his claim. Coleman v.
 25 Thompson, 501 U.S. 722, 729 (1991). To be adequate, the state procedural rule “must
 26 have been ‘firmly established and regularly followed’ by the time as of which it is to be
 27 applied.” Fields v. Calderon, 125 F.3d 757, 760 (9th Cir. 1997), quoting Ford v.
 28 Georgia, 498 U.S. 411, 424 (1991). “For a state procedural rule to be ‘independent,’ the
 state law basis for the decision must not be interwoven with federal law.” La Crosse v.
Kernan, 244 F.3d 702, 704 (9th Cir. 2001), citing Michigan v. Long, 463 U.S. 1032,
 1040-41 (1983) and Harris v. Reed, 489 U.S. 255, 265 (1989). If found to be both
 adequate and independent, “federal habeas review of the claims is barred unless the
 prisoner can demonstrate cause for the default and actual prejudice as a result of the
 alleged violation of federal law, or demonstrate that failure to consider the claims will
 result in a fundamental miscarriage of justice.” Coleman, 501 U.S. at 750.

1 **1. Dixon**

2 On state habeas review, the California Supreme Court denied habeas relief on
3 Claims 13, 23, 24 and 33 of the FAP (raised in state court as Claims 6, 8, 7, and 4,
4 respectively) on the merits, and alternatively stated that “claims 4, 6, 7, 8, and 9³ are
5 denied on the ground that they could have been, but were not, raised on appeal. (*In re*
6 *Dixon* (1953) 41 Cal.2d 756, 759.)” (Lodgment No. 144.)

7 **a. Independence**

8 “For a state procedural rule to be ‘independent,’ the state law basis for the decision
9 must not be interwoven with federal law.” *La Crosse*, 244 F.3d at 704, citing *Long*, 463
10 U.S. at 1040-41 and *Harris*, 489 U.S. 255, 265. In 1998, the California Supreme Court
11 announced that it would thereafter refrain from considering federal law in determining
12 whether a claim was procedurally defaulted. *See In re Robbins*, 18 Cal.4th 770, 811-12
13 (1998); *see also Park v. California*, 202 F.3d 1146, 1152 (9th Cir. 2000) (“The California
14 Supreme Court has adopted in *Robbins* a stance from which it will now decline to
15 consider federal law when deciding whether claims are procedurally defaulted.”) The
16 independence of a state procedural rule is examined at the time the rule is applied. *See*
17 *Park*, 202 F.3d at 1151-53. In this case, the rule was applied by the California Supreme
18 Court when Petitioner’s state habeas petition was denied on January 3, 2013.

19 While the Ninth Circuit has not ruled that a post-*Robbins* application of the *Dixon*
20 procedural bar was independent of federal law, several California district courts have
21 found the procedural bar to be independent. *See e.g. Protsman v. Pliler*, 318 F. Supp. 2d
22 1004, 1007-08 (S.D. Cal. 2004); *Gallardo v. Barnes*, 2014 WL 2854162 (C.D. Cal. 2014)
23 (collecting cases). As the *Dixon* rule was applied in this case nearly fifteen years after
24 *Robbins* and the California Supreme Court’s stated intention to refrain from considering
25 federal law in applying state procedural bars, this Court is in accord with other district
26 courts in concluding that the procedural rule was independent of federal law at the time
27

28 ³ Petitioner notes that Claim 9 in the state habeas petition was not raised in the
First Amended Petition. (Traverse at 16 n. 3.)

1 of its application to Petitioner's habeas claims.

2 **b. Adequacy**

3 To be adequate, a state procedural rule "must have been 'firmly established and
4 regularly followed' by the time as of which it is to be applied." Fields, 125 F.3d at 760,
5 quoting Ford, 498 U.S. at 424. In Bennett v. Mueller, 322 F.3d 573 (9th Cir. 2003), the
6 Ninth Circuit outlined a burden-shifting test to determine the adequacy of a state
7 procedural bar, stating that:

8 [T]he ultimate burden of proving the adequacy of the California state bar
9 is upon the State of California. . . . Once the state has adequately pled the
10 existence of an independent and adequate state procedural ground as an
11 affirmative defense, the burden to place that defense in issue shifts to the
12 petitioner. The petitioner may satisfy this burden by asserting specific
13 factual allegations that demonstrate the inadequacy of the state procedure,
14 including citation to authority demonstrating inconsistent application of the
15 rule. Once having done so, however, the ultimate burden is the state's.

16 Accordingly, because it is the State who seeks dismissal based on the
17 procedural bar, it is the State who must bear the burden of demonstrating
18 that the bar is applicable-in this case that the state procedural rule has been
19 regularly and consistently applied in habeas actions.

20 Bennett, 322 F.3d at 585-86.

21 Respondent asserts that Claims 13, 23, 24, and 33 are procedurally defaulted under
22 Dixon and that the procedural rule in question was both independent and adequate.
23 (Ans. at 15-17.) Here, Respondent has satisfied the initial burden of pleading the Dixon
24 procedural bar as an affirmative defense, and the burden shifts to Petitioner. See
25 Bennett, 322 F.3d at 586.

26 Petitioner "may satisfy this burden by asserting specific factual allegations that
27 demonstrate the inadequacy of the state procedure, including citation to authority
28 demonstrating inconsistent application of the rule." Id. "Because the Dixon rule
precludes collateral review of a claim that could have been brought on direct appeal, the
procedural default, though announced by the California Supreme Court when the habeas
petition is denied, technically occurs at the moment the direct appeal did not include
those claims that should have been included for review." Fields, 125 F.3d at 761.
Petitioner's default with respect to the Dixon rule occurred on June 16, 1997, the date

1 he filed an opening brief on direct appeal. (Lodgment No. 123.)

2 Petitioner argues that “*Dixon* was not being followed in the vast majority of cases
3 at the time of Petitioner’s alleged default,” and cites Dennis v. Brown, 361 F.Supp.2d
4 1124, 1130-31 (N.D. Cal. 2005), which in turn noted 200 cases demonstrating
5 inconsistent application of state procedural bars, including Dixon. (Traverse at 19-20.)
6 Petitioner also argues: “It is notable that, when federal courts have examined California’s
7 application of *Dixon* on the basis of evidence from both the petitioner and respondent,
8 they have found the rule inadequate to bar federal habeas review. Only when there has
9 been a technical failure on the part of a petitioner to present any evidence at all have the
10 courts ruled on behalf of respondent and held the bar adequate.” (Traverse at 20-21)
11 (footnotes omitted.) Petitioner cites to numerous cases in which the Dixon rule was
12 found inadequate, as well as numerous other cases in which Dixon was ruled adequate
13 on “technical grounds.” (*Id.*) Given Petitioner’s argument and citation to authority
14 showing the Dixon rule has been applied inconsistently, the Court finds that Petitioner
15 has satisfied the “burden to place that defense in issue.” Bennett, 322 F.3d at 586.

16 Therefore, “the ultimate burden is the state’s.” *Id.*; see also King v. Lamarque,
17 464 F.3d 963, 967 (9th Cir. 2006). Because Respondent has not attempted to
18 demonstrate the adequacy of the Dixon bar, the Court cannot conclude that this state
19 procedural rule is sufficient to bar consideration of Petitioner’s claims on the merits. The
20 Court will consider Claims 13, 23, 24, and 33 on the merits.

21 **2. Contemporaneous Objection**

22 Respondent contends that “Claim Twelve is procedurally barred because the
23 California Supreme Court found that the claim was not preserved for appellate review.”
24 (Ans. at 17, citing Roybal, 19 Cal. 4th at 520.) The state supreme court denied this claim
25 on alternative grounds, as follows:

26 As a threshold matter, because he did not object to the prosecutor’s
27 remarks, defendant failed to preserve the claim of prosecutorial misconduct
28 for review. (*People v. Wash* (1993) 6 Cal.4th 215, 259-260 [24 Cal.Rptr.2d
421, 861 P.2d 1107].) But the claim also fails on its merits, in the absence
of prejudice.

1 Roybal, 19 Cal. 4th at 520.

2 Petitioner argues that claims denied on the merits are not barred from federal
3 habeas review unless “the state court ‘actually relied’ on the procedural bar as an
4 independent basis for disposing of the claim.” (Traverse at 23.) In this case, it appears
5 that the state court did rely upon a state procedural bar as an independent basis for
6 denying Claim 12, and the procedural bar stands regardless of the state court’s decision
7 to also adjudicate the claim on its merits. See Harris, 489 U.S. at 264 n. 10 (“[A] state
8 court need not fear reaching the merits of a federal claim in an alternative holding. By
9 its very definition, the adequate and independent state ground doctrine requires the
10 federal court to honor a state holding that is a sufficient basis for the state court’s
11 judgment, even when the state court also relies on federal law.”)

12 Petitioner does not appear to offer any specific argument on the independence or
13 adequacy of this particular procedural bar, but instead generally argues that “[t]o the
14 extent that this Court might find that a claim for relief in the First Amended Petition is
15 defaulted because the California Supreme Court denied relief based on an adequate and
16 independent state procedural bar, Petitioner is excused from that default because he can
17 demonstrate cause and prejudice.” (Traverse at 23.) Petitioner offers a lengthy argument
18 asserting that the ineffective assistance of counsel he suffered satisfies cause and
19 prejudice for any defaulted claims. (Id. at 23-28, 88-91, 94-96.) With respect to the
20 allegations raised in Claim 12, Petitioner has separately alleged in Claim 9 that trial
21 counsel’s failure to object to the prosecutor’s comments is an independent claim of
22 constitutional error.

23 “‘Cause’ is a legitimate excuse for the default; ‘prejudice’ is actual harm resulting
24 from the alleged constitutional violation.” Magby v. Wawrzaszek, 741 F.2d 240, 244
25 (9th Cir. 1984). The Supreme Court has held that a cause and prejudice analysis applies
26 to the contemporaneous objection rule. See e.g. Wainwright v. Sykes, 433 U.S. 72, 90-
27 91 (1977); United States v. Frady, 456 U.S. 152, 167-68 (1982).

28 The Supreme Court has explained that while “[a]ttorney ignorance or inadvertence

1 is not ‘cause’ because the attorney is petitioner’s agent when acting, or failing to act, in
 2 furtherance of the litigation, and the petitioner must ‘bear the risk of attorney error,’” that
 3 “[a]ttorney error that constituted ineffective assistance of counsel is cause, however.”
 4 Coleman, 501 U.S. at 753-54. “Where a petitioner defaults a claim as a result of the
 5 denial of the right to effective assistance of counsel, the State, which is responsible for
 6 the denial as a constitutional matter, must bear the costs of any resulting default and the
 7 harm to state interests that federal habeas review entails.” Id. at 754.

8 In this case, trial counsel’s failure to object to the prosecutor’s biblical argument
 9 prevented the preservation of that prosecutorial misconduct claim for appeal. Again,
 10 “counsel’s ineffectiveness will constitute cause only if it is an independent constitutional
 11 violation.” Coleman, 501 U.S. at 755. With respect to trial counsel’s failure to object,
 12 the Ninth Circuit has indicated that “[b]ecause many lawyers refrain from objecting
 13 during opening statement and closing argument, absent egregious misstatements, the
 14 failure to object during closing argument and opening statement is within the ‘wide
 15 range’ of permissible professional legal conduct.” Cunningham v. Wong, 704 F.3d
 16 1143, 1159 (9th Cir. 2013), quoting United States v. Necoechea, 986 F.2d 1273, 1281
 17 (9th Cir. 1993). However, as discussed below with respect to Claim 9, the prosecutor’s
 18 exhortation to the jury about biblical law was egregious, and defense counsel’s failure
 19 to object to the misconduct fell outside the admittedly “wide range” of constitutionally
 20 tolerable conduct. In light of the prosecutor’s clearly and conspicuously improper
 21 remarks, the Court concludes that Petitioner’s claim of ineffective assistance satisfies
 22 cause in this regard. See Edwards v. Carpenter, 529 U.S. 446, 451 (2000) (“Although
 23 we have not identified with precision exactly what constitutes ‘cause’ to excuse a
 24 procedural default, we have acknowledged that in certain circumstances counsel’s
 25 ineffectiveness in failing properly to preserve the claim for review in state court will
 26 suffice.”), citing Murray v. Carrier, 477 U.S. 478, 488-89 (1986).

27 Petitioner has also shown “actual prejudice.” Coleman, 501 U.S. at 750.
 28 Prejudice is “actual harm resulting from the claimed constitutional violation.” LaGrand

1 v. Stewart, 173 F.3d 1144, 1148 (9th Cir. 1999), citing Magby, 741 F.2d at 244. The
 2 California Supreme Court recognized that the prosecutor's remarks constituted "clear
 3 misconduct." See Roybal, 19 Cal. 4th at 521. Here, given the closeness of the penalty
 4 phase case, evidenced by the fact that the jurors deliberated for several days, during
 5 which they requested read back of witness testimony, received supplemental instructions
 6 and repeatedly expressed that they were deadlocked prior to finally reaching a verdict, in
 7 combination with the inflammatory nature of the improper remarks, it is evident to this
 8 Court that Claim 12 is meritorious, and that the misconduct at issue resulted in "actual
 9 harm." LaGrand, 173 F.3d at 1148. Petitioner has demonstrated cause and prejudice
 10 sufficient to excuse the procedural default. Accordingly, the Court will evaluate Claim
 11 12 on the merits.

12 **B. Teague v. Lane**

13 "Unless they fall within an exception to the general rule, new constitutional rules
 14 of criminal procedure will not be applicable to those cases which have become final
 15 before the new rules are announced." Teague v. Lane, 489 U.S. 288, 316 (1989)
 16 (plurality); see also Stringer v. Black, 503 U.S. 222, 227 (1992) ("Subject to two
 17 exceptions, a case decided after a petitioner's conviction and sentence became final may
 18 not be the predicate for federal habeas corpus relief unless the decision was dictated by
 19 precedent existing when the judgment in question became final.") A new rule is one that
 20 "breaks new ground or imposes a new obligation on the States or the Federal
 21 Government," or one whose "result was not dictated by precedent existing at the time
 22 defendant's conviction became final." Teague, 489 U.S. at 301. The two exceptions to
 23 Teague are if the new rule in question: (1) "places 'certain kinds of primary, private
 24 individual conduct beyond the power of the criminal law-making authority to
 25 proscribe,'" or (2) "requires the observance of procedures 'implicit in the concept of
 26 ordered liberty.'" Id. at 307, quoting Mackey v. United States, 401 U.S. 667, 692, 693
 27 (1971). "That a new procedural rule is 'fundamental' in some abstract sense is not
 28 enough; the rule must be one 'without which the likelihood of an accurate conviction is

1 *seriously* diminished.” Schriro v. Summerlin, 542 U.S. 348, 352 (2004), quoting
 2 Teague, 489 U.S. at 313. “[I]f the State does argue that the defendant seeks the benefit
 3 of a new rule of constitutional law, the court *must* apply Teague v. Lane before
 4 considering the merits of the claim.” Caspari v. Bohlen, 510 U.S. 383, 389 (1994).

5 Here, Respondent generally references Teague, but fails to offer any argument
 6 specific to the claims in the FAP, stating only that: “To the extent any of Roybal’s claims
 7 rely upon a new rule of constitutional law, including so-called ‘actual innocence,’ the
 8 non-retroactivity doctrine forecloses federal habeas relief because, at the time his
 9 conviction became final, existing precedent did not ‘compel’ the result he now seeks.”
 10 (Ans. at 18.) The Ninth Circuit has previously declined to conduct a Teague analysis
 11 when it is noted “only in passing.” Arredondo v. Ortiz, 365 F.3d 778, 781 (9th Cir.
 12 2004) (“Normally we decline to address an issue that is simply mentioned but not argued,
 13 and we see no reason to depart from that practice in a habeas appeal.”) (internal citation
 14 omitted). In this case, Respondent does not offer any specific Teague argument with
 15 respect to the claims in the FAP and has not properly raised the issue before the Court.
 16 See Arredondo, 365 F.3d at 782 (“No true Teague argument having been made by the
 17 state in this case, we decline to conduct a Teague analysis on our own.”), citing Caspari,
 18 510 U.S. at 389.

19 **IV. STANDARDS OF REVIEW**

20 **A. Standard of Merits Review under AEDPA**

21 The provisions of the Anti-Terrorism and Effective Death Penalty Act [“AEDPA”]
 22 apply to federal habeas petitions filed after its effective date of April 24, 1996. See
 23 Lindh v. Murphy, 521 U.S. 320, 336 (1997); Woodford v. Garceau, 538 U.S. 202, 207
 24 (2003). Because Petitioner filed his federal petition in this Court after that date, AEDPA
 25 applies to this case.

26 Pursuant to AEDPA, a state prisoner is not entitled to federal habeas relief on a
 27 claim that the state court adjudicated on the merits unless that ruling: “(1) resulted in a
 28 decision that was contrary to, or involved an unreasonable application of, clearly

1 established Federal law, as determined by the Supreme Court of the United States,” or
2 “(2) resulted in a decision that was based on an unreasonable determination of the facts
3 in light of the evidence presented in the State court proceeding.” Harrington v. Richter,
4 562 U.S. 86, 97-98 (2011), quoting 28 U.S.C. § 2254(d)(1)-(2).

5 A decision is “contrary to” clearly established law if “the state court arrives at a
6 conclusion opposite to that reached by [the Supreme] Court on a question of law or if the
7 state court decides a case differently than [the Supreme] Court has on a set of materially
8 indistinguishable facts.” Williams v. Taylor, 529 U.S. 362, 413 (2000). A decision
9 involves an “unreasonable application” of clearly established federal law if “the state
10 court identifies the correct governing legal principle . . . but unreasonably applies that
11 principle to the facts of the prisoner’s case.” Id.; Bruce v. Terhune, 376 F.3d 950, 953
12 (9th Cir. 2004). “Section 2254(d)(1)’s ‘clearly established’ phrase ‘refers to the
13 holdings, as opposed to the dicta, of [the Supreme] Court’s decisions at the time of the
14 relevant state-court decision.” Lockyer v. Andrade, 538 U.S. 63, 71 (2003), quoting
15 Williams, 529 U.S. at 412.

16 “[C]ircuit precedent does not constitute ‘clearly established Federal law, as
17 determined by the Supreme Court,’ 28 U.S.C. 2254(d)(1). It therefore cannot form the
18 basis for habeas relief under AEDPA.” Parker v. Matthews, 567 U.S. ___, 132 S.Ct.
19 2148, 2155 (2012). However, “circuit court precedent may be persuasive in determining
20 what law is clearly established and whether a state court applied that law unreasonably.”
21 Stanley v. Cullen, 633 F.3d 852, 859 (9th Cir. 2011), quoting Maxwell v. Roe, 606 F.3d
22 561, 567 (9th Cir. 2010); see also Marshall v. Rodgers, 569 U.S. ___, 133 S.Ct. 1446,
23 1450-51 (2013) (per curiam) (While a reviewing court may “look to circuit precedent to
24 ascertain whether it has already held that the particular point in issue is clearly
25 established by Supreme Court precedent, . . . it may not canvass circuit decisions to
26 determine whether a particular rule of law is so widely accepted among Federal Circuits
27 that it would, if presented to [the Supreme] Court, be accepted as correct.”) (internal
28 citations and quotations omitted).

1 Additionally, with respect to section 2254(d)(2), “[t]he question under AEDPA is
 2 not whether a federal court believes the state court’s determination was incorrect but
 3 whether that determination was unreasonable—a substantially higher threshold.” Schiro
 4 v. Landrigan, 550 U.S. 465, 473 (2007), citing Williams, 529 U.S. at 410. “State-court
 5 factual findings, moreover, are presumed correct; the petitioner has the burden of
 6 rebutting the presumption by ‘clear and convincing evidence.’” Rice v. Collins, 546 U.S.
 7 333, 338-39 (2006), quoting 28 U.S.C. § 2254(e)(1).

8 “A state court’s determination that a claim lacks merit precludes federal habeas
 9 relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s
 10 decision.” Richter, 562 U.S. at 101, quoting Yarborough v. Alvarado, 541 U.S. 652, 664
 11 (2004). “If this standard is difficult to meet, that is because it was meant to be. As
 12 amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court
 13 relitigation of claims already rejected in state proceedings. . . . It preserves authority to
 14 issue the writ in cases where there is no possibility fairminded jurists could disagree that
 15 the state court’s decision conflicts with [the Supreme] Court’s precedents.” Richter, 562
 16 U.S. at 102.

17 Claims 4-11, 13, 23-30, and 32-39 were each denied on the merits by the
 18 California Supreme Court in a January 2, 2013, Order which stated in relevant part:

19 The “Petition for Writ of Habeas Corpus” filed October 1, 2007, is
 20 denied. Claim 19 is denied as premature without prejudice to petitioner’s
 21 filing a renewed petition after any execution date is set. (*People v. Lawley*
 22 (2002) 27 Cal.4th 102, 169, fn. 25.) All remaining claims are denied on the
 merits.

(Lodgment No. 144.)

23 Because these claims were denied on the merits without a statement of reasoning,
 24 the Court will conduct an independent review of the record with respect to Claims 4-11,
 25 13, 23-30, and 32-39⁴ in order “to determine whether the state court clearly erred in its

27 ⁴ Aspects of Claim 39 were raised on both direct appeal and state habeas review
 28 and therefore, to the extent that the California Supreme Court issued a reasoned opinion
 on certain contentions, the Court will review the state supreme court’s direct appeal
 opinion in order to determine, pursuant to section 2254(d), whether its adjudication was
 contrary to, or an unreasonable application of, clearly established federal law, or was

1 application of Supreme Court Law.” See Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir.
 2 2002); see also Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000) (in the absence of
 3 a reasoned decision by the state court, “[o]nly by [an independent review of the record]
 4 may we determine whether the state court’s decision was objectively unreasonable.”)

5 Petitioner also argues that a number of claims in the FAP are “not entitled to
 6 deference because there was a complete breakdown in the state habeas corpus procedure
 7 as a result of the destruction of the trial files by former habeas counsel,” and asserts that
 8 de novo review is instead appropriate. (FAP at 139.) Petitioner contends that “the lack
 9 of a complete or even cohesive trial record makes it impossible to determine which facts
 10 could have been presented by current habeas counsel or considered by the California
 11 Supreme Court in its ‘postcard’ denial on the merits” with respect to Claims 4-10 and 25-
 12 26. (Id.) He also asserts that de novo review of Claim 1 is appropriate because the state
 13 court proceeding was “procedurally defective.” (Id. at 153-54.) The Court will address
 14 these arguments in the merits discussion of those claims.

15 **B. Standard for Evidentiary Hearing**

16 For claims previously decided on the merits by a state court, the Supreme Court
 17 has held that a federal habeas court’s “review under § 2254(d)(1) is limited to the record
 18 that was before the state court that adjudicated the claim on the merits.” Cullen v.
 19 Pinholster, 563 U.S. 170, 131 S.Ct. 1388, 1398 (2011). “Although state prisoners may
 20 sometimes submit new evidence in federal court, AEDPA’s statutory scheme is designed
 21 to strongly discourage them from doing so.” Id. at 1401. Section 2254(d)(2),
 22 meanwhile, expressly limits a reviewing court to the “evidence presented in the State
 23 court proceeding.” 28 U.S.C. § 2254(d)(2).

24 Section 2254(e)(2) of AEDPA further limits the circumstances under which a
 25 district court may hold an evidentiary hearing. If the prisoner “has failed to develop the
 26 factual basis of a claim in State court proceedings,” a district court is precluded from
 27 holding an evidentiary hearing unless the prisoner meets certain narrow exceptions. 28

28 _____
 based on an unreasonable determination of the facts. See Williams, 529 U.S. at 413.

1 U.S.C. § 2254(e)(2). The claim in question must either rely upon “(i) a new rule of
 2 constitutional law, made retroactive to cases on collateral review by the Supreme Court,
 3 that was previously unavailable” or “(ii) a factual predicate that could not have been
 4 previously discovered through the exercise of due diligence;” and the prisoner must
 5 show that “the facts underlying the claim would be sufficient to establish by clear and
 6 convincing evidence that but for constitutional error, no reasonable factfinder would
 7 have found the applicant guilty of the underlying offense.” Id. “Section 2254(e)(2)
 8 continues to have force where 2254(d)(1) does not bar habeas relief,” for instance, “when
 9 deciding claims that were not adjudicated on the merits in state court.” Pinholster, 131
 10 S.Ct. at 1401.

11 “Because the deferential standards prescribed by 2254 control whether to grant
 12 habeas relief, a federal court must take into account those standards in deciding whether
 13 an evidentiary hearing is appropriate.” Landrigan, 550 U.S. at 474. “It follows that if
 14 the record refutes the applicant’s factual allegations or otherwise precludes relief, a
 15 district court is not required to hold an evidentiary hearing.” Id.; see also Sully v. Ayers,
 16 725 F.3d 1057, 1075 (9th Cir. 2013) (“[A]n evidentiary hearing is pointless once the
 17 district court has determined that § 2254(d) precludes habeas relief.”)

18 In light of these limitations, the Court will therefore conduct a section 2254(d)
 19 review, provided the claims at issue are subject to section 2254(d), together with the
 20 evaluation of whether Petitioner’s federal habeas claims warrant an evidentiary hearing.

21 V. DISCUSSION

22 The claims presented in the FAP include allegations of ineffective assistance of
 23 counsel, trial court error, prosecutorial misconduct, juror bias, claims of error in jury
 24 instructions during the guilt and penalty phase proceedings, an Atkins claim, claims
 25 concerning issues surrounding Petitioner’s post-conviction representation and
 26 destruction of the record, and several claims alleging defects in California’s death
 27 penalty statute.

A. CLAIMS OF TRIAL COURT ERROR AND JUROR BIAS

1. Claim 1

Petitioner alleges that his sentence and incarceration are in violation of the United States Constitution “because of the trial court’s rulings that a bloody fingerprint found at the Weden residence- a fingerprint made by someone other than Mr. Roybal- was not exculpatory evidence and because of the trial court’s refusal to appropriately instruct the jury given the circumstances surrounding the collection including, but not limited to the negligent preservation of this evidence.” (FAP at 140.)

a. State Court Decision

The California Supreme Court rejected this claim on direct appeal, detailing the background of the claim and the grounds for the ruling, as follows:

During the search of the Weden residence, police found an “orangish-red” print on a doorjamb. The print was photographed and, after unsuccessful attempts to lift it, the doorjamb was removed for further analysis. When defense counsel later sought to view the doorjamb, it was missing from the police department facility where it had been stored after testing.

Defendant moved to dismiss or, in the alternative, for sanctions, on the grounds that the prosecution had lost or destroyed exculpatory evidence in violation of the due process clause of the Fourteenth Amendment, and that comparable evidence could not be obtained by other reasonable means. Both the defense and the prosecution subpoenaed numerous witnesses to testify at the hearing on the motion. At the hearing, the superior court determined that, to “streamline” the procedure, defendant would first be required to make an offer of proof, which the court would take “at face value” subject to further examination; the prosecution would then be permitted to rebut the offer of proof through the testimony of witnesses, who would also be available for cross-examination by defendant. Defense counsel reluctantly agreed to the procedure: “I’m only hesitant because of the nature of the proof, your honor. The quality of my talking to the court versus live testimony is a concern to me. And, as you’ve indicated, you have the power in this courtroom to decide. And I still have my reservations about proceeding this way; but I will, if that’s the court’s desire.”

Defendant’s offer of proof was to the effect that the print “was believed to have been made by the person who committed the homicide or by a person involved,” and that analysis showed that it was not defendant’s print. Police were subsequently unable to produce the doorjamb for inspection by the defense because it was missing.

With the exception of two witnesses-Lee Smith, an expert in fingerprint comparison who purportedly would have testified that the photograph was limited in usefulness compared to the doorjamb itself, and Prosecutor James Koerber, who purportedly would have been asked why it

1 took two years to arraign defendant formally on murder charges-all of
 2 defendant's proposed witnesses were called by the prosecution and
 3 cross-examined by defendant. Their testimony regarding the identity of the
 4 print was to the effect that attempts to lift the print from the doorjamb were
 5 unsuccessful, but the photographs of the print were of sufficient quality for
 6 comparison purposes. Based on analysis of the photographs, the print could
 not be positively identified as belonging to defendant, but neither could
 defendant be eliminated as a donor. The superior court denied defendant's
 request to permit his expert, Smith, to sit in on the testimony of one of the
 prosecution's witnesses on this point, Joe Sypnicki, a print examiner for the
 Department of Justice.

7 The testimony of the prosecution's witnesses as to the disappearance
 8 of the doorjamb was to the effect that it was routinely booked into the
 Oceanside Police Department but disappeared during the time when the
 9 police department moved its evidence facilities. Police personnel made
 several unsuccessful searches to locate the item.

10 At the close of the prosecution's presentation of evidence, the
 11 superior court asked defendant whether he wished to present a "[w]itness
 or evidence on behalf of the defense." Defendant declined: "We rest, your
 honor, after submitting what's been submitted."

12 The superior court ruled that the print had "no exculpatory value for
 13 the defendant" because it was not of sufficient quality to determine whether
 it matched defendant's prints. It also ruled that there was no bad faith by the
 14 police: "[T]his is probably an administrative screw up [T]his door
 jamb has been somehow misplaced or misfiled."

15 At trial, witnesses for both the defense and the prosecution testified
 16 that there was not a match between the print on the doorjamb and
 defendant's fingerprints. Defendant's witnesses included expert Smith, who
 17 also testified that the print was not defendant's. At the close of evidence,
 18 defendant verbally requested an instruction to the effect that the police
 department's loss of the doorjamb made testing the print for blood
 19 impossible and police error prevented use of various forensic methods to
 enhance the print. The superior court rejected the proposed instruction as
 20 argumentative, but did not preclude defendant from submitting a written
 proposed instruction concerning the doorjamb. Defendant did not do so.

21 Defendant claims the superior court erred in failing to impose
 22 sanctions based on the disappearance of the doorjamb. The claim is without
 merit.

23 Law enforcement agencies have a duty, under the due process clause
 24 of the Fourteenth Amendment, to preserve evidence "that might be
 expected to play a significant role in the suspect's defense." (*California v.*
 25 *Trombetta* (1984) 467 U.S. 479, 488 [104 S.Ct. 2528, 2534, 81 L.Ed.2d
 413]; accord, *People v. Beeler* (1995) 9 Cal.4th 953, 976 [39 Cal.Rptr.2d
 26 607, 891 P.2d 153].) To fall within the scope of this duty, the evidence
 "must both possess an exculpatory value that was apparent before the
 27 evidence was destroyed, and be of such a nature that the defendant would
 be unable to obtain comparable evidence by other reasonably available
 28 means." (*California v. Trombetta, supra*, 467 U.S. at p. 489 [104 S.Ct. at
 p. 2534]; *People v. Beeler, supra*, 9 Cal.4th at p. 976). The state's
 responsibility is further limited when the defendant's challenge is to "the
 failure of the State to preserve evidentiary material of which no more can

1 be said than that it could have been subjected to tests, the results of which
 2 might have exonerated the defendant.” (*Arizona v. Youngblood* (1988) 488
 3 U.S. 51, 57 [109 S.Ct. 333, 337, 102 L.Ed.2d 281].) In such case, “unless
 4 a criminal defendant can show bad faith on the part of the police, failure to
 preserve potentially useful evidence does not constitute a denial of due
 process of law.” (*Id.* at p. 58 [109 S.Ct. at p. 337]; accord, *People v. Beeler*,
supra, 9 Cal.4th at p. 976.)

5 On review, we must determine whether, viewing the evidence in the
 6 light most favorable to the superior court’s finding, there was substantial
 7 evidence to support its ruling. (*People v. Griffin* (1988) 46 Cal.3d 1011,
 1022 [251 Cal.Rptr. 643, 761 P.2d 103].) Under that standard, the superior
 8 court did not err in concluding that the evidence at issue did not possess an
 9 exculpatory value that was apparent before it disappeared; the print may or
 10 may not have been defendant’s and may or may not have been the
 perpetrator’s. Nor did it err in concluding that the disappearance of the
 doorjamb was inadvertent and not the product of bad faith conduct by the
 police; indeed, nothing in defendant’s offer of proof disputed such a
 conclusion.^{FN3}

11 FN3 Defendant did not seek to present additional witnesses or
 12 evidence after the prosecution rested. The only witnesses
 13 referred to in the offer of proof who did not testify at the
 14 hearing were Smith and Koerber. Smith’s testimony, which,
 15 according to the offer of proof, would have been to the effect
 16 that the doorjamb itself was more useful than a photograph of
 17 the print because the detail would be sharper, was not
 inconsistent with the superior court’s conclusion that the
 missing evidence did not have apparent exculpatory value.
 Koerber’s testimony, which, according to the offer of proof,
 would have concerned the purported delay in arraigning
 defendant on murder charges, was also not inconsistent with
 that conclusion.

18 Defendant also claims that the superior court erred by refusing to
 19 permit him to call witnesses or to allow his expert to observe the
 20 examination of the prosecution’s expert, by limiting cross-examination of
 21 Sypnicki about specific forensic techniques, and by refusing to give his
 22 proposed instruction. The claims are unavailing; the superior court properly
 23 concluded that the evidence did not, in any event, have apparent
 24 exculpatory value. Moreover, the record reveals that, although the
 25 prosecution was permitted to present its witnesses first, defendant was not
 26 precluded from presenting his case or from examining most of the witnesses
 27 mentioned in his offer of proof; he did not seek to present additional
 28 witnesses after the prosecution rested. As defendant concedes, the superior
 court had discretion to regulate the order of proof. (Evid. Code, § 320.) Nor
 did the superior court abuse its discretion by excluding all witnesses from
 the courtroom during Sypnicki’s testimony (see Evid. Code, § 777 [with
 limited exceptions, “the court may exclude from the courtroom any witness
 not at the time under examination so that such witness cannot hear the
 testimony of other witnesses”]), or by limiting the cross-examination of
 Sypnicki about forensic techniques on relevance grounds. In light of its
 conclusion that the evidence did not have apparent exculpatory value, it
 was also not error for the superior court to refuse defendant’s proposed
 instruction on the ground that it was argumentative.^{FN4}

FN4 Defendant claims that he was denied effective assistance of counsel under the federal and state Constitutions because his counsel failed to request an appropriate instruction permitting the jurors to draw an adverse inference from the disappearance of the doorjamb. “Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to assistance of counsel. [Citations.] The ultimate purpose of this right is to protect the fundamental right to a trial that is both fair in its conduct and reliable in its result [Citations.] [¶] Construed in light of its purpose, the right entitles the defendant not to some bare assistance but rather to *effective* assistance.” (*People v. Ledesma* (1987) 43 Cal.3d 171, 215 [233 Cal.Rptr. 404, 729 P.2d 839], original italics.) To establish entitlement to relief, defendant must show deficient performance under an objective standard of professional reasonableness and prejudice under a test of reasonable probability of a different outcome. (*Id.* at pp. 215-218.) For the reasons discussed, there are no grounds for establishing deficient performance; the evidence lacked apparent exculpatory value. In addition, defendant asserts violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 15, 16, and 17 of the California Constitution. The claims are predicated on alleged state law error; because, for the reasons discussed in the text, we discern no such error, the constitutional claims necessarily also fail.

Roybal, 19 Cal. 4th at 508-11 (alterations in original).

b. Standard of Review

Petitioner argues that the Court should review Claim 1 de novo because the state court’s fact-finding process was deficient, asserting that:

In this case, the hearing on the loss or destruction of the doorjamb was procedurally defective in that (1) it precluded the defense from presenting witnesses prior to the prosecution’s witnesses and (2) the trial court ordered the defense expert excluded during the testimony of Joseph Sypnicki, thereby precluding the trier of fact from determining all the facts and circumstances surrounding the condition of the fingerprint and its potential exculpatory value. Finally, the trial court refused to offer any curative instruction in lieu of a sanction such as dismissal.

(FAP at 153-54.)

“[A] federal court may not second-guess a state court’s fact-finding process unless, after review of the state-court record, it determines that the state court was not merely wrong, but actually unreasonable.” *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). “[B]efore we can determine that the state-court factfinding process is defective

1 in some material way, or perhaps non-existent, we must more than merely doubt whether
2 the process operated properly. Rather, we must be satisfied that any appellate court to
3 whom the defect is pointed out would be unreasonable in holding that the state court's
4 fact-finding process was adequate." Id. at 1000. "If, for example, a state court makes
5 evidentiary findings without holding a hearing and giving petitioner an opportunity to
6 present evidence, such findings clearly result in an 'unreasonable determination' of the
7 facts." Id. at 1001, citing Weaver v. Thompson, 197 F.3d 359, 363 (9th Cir. 1999) and
8 Nunes v. Mueller, 350 F.3d 1045, 1055 (9th Cir. 2003).

9 Here, Petitioner fails to persuasively show that the hearing on the defense motion
10 regarding the loss/destruction of the doorjamb evidence was somehow defective or
11 inadequate. Petitioner first contends that the trial court "precluded the defense from
12 presenting witnesses prior to the prosecution's witnesses." (FAP at 153.) Specifically,
13 Petitioner argues that "[i]nstead of permitting live testimony, the trial court limited Mr.
14 Roybal's attempt to establish that the prosecution had lost and/or destroyed exculpatory
15 evidence to an offer of proof," and that "[t]he power to control the *order* of proof is
16 neither synonymous nor coextensive with the court's power to exercise control over the
17 admission of evidence." (FAP at 170.) The California Evidence Code provides that "the
18 court in its discretion shall regulate the order of proof." Cal. Ev. Code § 320.

19 Moreover, the California Penal Code instructs that "[i]t shall be the duty of the
20 judge to control all proceedings during the trial, and to limit the introduction of evidence
21 and the argument of counsel to relevant and material matters, with a view to the
22 expeditious and effective ascertainment of the truth regarding the matters involved."
23 Cal. Penal Code § 1044. After reviewing the record, it is clear that the trial court was
24 within its discretion in conducting the hearing in this manner. Petitioner does not show
25 that the trial court prevented him from presenting relevant evidence, only that he was
26 directed to initially present such evidence through an offer of proof rather than via live
27
28

1 testimony.⁵

2 Petitioner's reliance on Old Chief v. United States, 519 U.S. 172 (1997), is
3 distinguishable from the instant situation, as first, that case concerned a defendant's
4 attempt to stipulate to the commission of a prior offense. Petitioner insists that the
5 situations are "parallel," arguing that:

6 While Petitioner was not compelled to accept a stipulation, like a party so
7 compelled, Mr. Roybal was forced to forgo presentation of his case via live
8 witnesses, and, instead, present his evidence in the lifeless form of an offer
9 of proof. As Justice Souter reasoned in *Old Chief*, *supra*, "[a] syllogism is
not a story, and a naked proposition in a courtroom may be no match for the
robust evidence that would be used to prove it. *Id.*, at 189.

10 (FAP at 171.) The Old Chief Court held that in most situations "the prosecution is
11 entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal
12 defendant may not stipulate or admit his way out of the full evidentiary force of the case
13 as the Government chooses to present it." Old Chief, 519 U.S. at 186-87. However, it
14 is also clear that the Old Chief Court was specifically concerned with the impact of
15 evidence on a criminal trial jury. *See e.g. id.* at 187 ("Jury duty is usually unsought and
16 sometimes resisted, and it may be as difficult for one juror suddenly to face the findings
17 that can send another human being to prison, as it is for another to hold out
18 conscientiously for acquittal. When a juror's duty does seem hard, the evidentiary
19 account of what a defendant has thought and done can accomplish what no set of abstract
20 statements ever could, . . .") The Court finds no compelling "parallel" to the current
21 case, which concerns evidence presented at a pre-trial motion hearing before a trial
22 judge, presented in the form requested by that judge, rather than a proceeding before a
23 jury.

24 The trial court did not prevent the defense from examining the live witnesses that
25 were called to testify by the prosecution after the offer of proof, and indeed, the defense

27 ⁵ Courts, including this district, routinely develop and enact procedures to
28 streamline matters for timely and efficient adjudication of pending matters. *See e.g.*
CivLR 40.1 (Assignment of Civil Cases), Crim LR 11.1 (Referral of Felony Cases to
Magistrate Judges for Taking of Guilty Pleas), CrimLR 57.2 (Assignment).

engaged in an often extensive cross-examination of the witnesses. (See e.g. PRT⁶ 71-86 (cross of DOJ latent print examiner Joe Sypnicki), PRT 105-20 (San Diego County Sheriff's examiner Frederick Freiberg), PRT 127-35 (Detective Richard Trotter), PRT 152-67 (Detective Sheila Hancock), PRT 183 (Sergeant William Krunglevich).) Nor was the defense precluded from calling witnesses on their behalf, as the trial court provided the defense an opportunity to call witnesses or present additional evidence, evidenced by the following exchange between the trial judge and defense counsel:

The Court: Witnesses or evidence on behalf of the defense?

Ms. Cannon: We rest, Your Honor, after submitting what's been submitted.
(PRT 185.)

Ultimately, the majority of the witnesses mentioned in the defense's original offer of proof testified at the hearing- only prosecutor Koerber and fingerprint analyst Lee Smith did not. After hearing the offer and proof and testimony, the trial court stated that Mr. Koerber's testimony was "not necessary," and the prosecutor declined to provide an offer of proof. (PRT 185.) With respect to Mr. Smith, as noted above, the record reflects that the defense affirmatively declined to present additional evidence or testimony.

Similarly unavailing is Petitioner's second argument, in which he asserts that the procedure was defective because the trial court "ordered the defense expert excluded during the testimony of Joseph Sypnicki." (FAP at 153.) When Sypnicki was about to testify, defense counsel requested that Smith be allowed to listen to the testimony; the trial court denied that request. (PRT 36-37.) As Petitioner acknowledges, it is within a trial court's discretion to exclude witnesses from the courtroom who have not yet testified. (See FAP at 171-72.); see also Cal. Ev. Code § 777 ("[T]he court may exclude from the courtroom any witness not at the time under examination so that such witness cannot hear the testimony of other witnesses.") Moreover, it was *defense counsel* that initially requested the exclusion of all testifying witnesses from the courtroom. Just prior

⁶ All references to the pre-trial transcripts in Claim 1 are to Volume PT-17, which is entitled "in Limine Motions" and dated February 20, 1992. (See Lodgment No. 62.)

1 to commencing the offer of proof, defense counsel stated: “At this time I would ask the
2 Court to exclude all witnesses to this hearing,” and when asked to identify the witnesses,
3 counsel included both Mr. Sypnicki and Mr. Smith in the list; the trial court granted the
4 request. (PRT 18-19.) Defense counsel also requested that the trial court “admonish
5 them not to speak to each other with regard to the nature of the circumstances of the facts
6 relating to this area;” the trial court accordingly issued an admonishment not to discuss
7 the testimony or offers of proof until the witnesses had been called to testify. (PRT 18.)
8 The Court finds no abuse of discretion in the trial court’s ruling.

9 Third, Petitioner simply contends that de novo review is required because the “trial
10 court refused to offer any curative instruction in lieu of a sanction such as dismissal.”
11 (FAP at 153-54.) At the conclusion of the pre-trial hearing on the request for sanctions
12 due to the loss or destruction of evidence, the Court held that a curative instruction was
13 not warranted because the defense failed to meet the standards set forth in Youngblood
14 and Trombetta with respect to the doorjamb. (See PRT 197.) Petitioner fails to
15 persuasively explain how the trial court’s final ruling implicates the adequacy of the state
16 court’s fact-finding *process* so as to warrant de novo review of this claim.

17 Given that the trial court’s procedure allowed for the presentation of evidence and
18 the examination of witnesses, that the trial court specifically asked the defense if they
19 wished to present additional evidence or witnesses prior to issuing its ruling, and that the
20 request to exclude witnesses from the courtroom came from defense counsel, the trial
21 court’s actions appear to be well within the bounds of discretion. The Court remains
22 unpersuaded that the state court’s fact-finding process was deficient, nor does Petitioner
23 demonstrate the much higher burden demanded by Taylor. Id., 366 F.3d at 1000
24 (“Rather, we must be satisfied that any appellate court to whom the defect is pointed out
25 would be unreasonable in holding that the state court’s fact-finding process was
26 adequate.”) For the reasons stated above, de novo review is not appropriate.
27 Accordingly, the Court will evaluate this claim pursuant to § 2254(d).
28

1 **c. Discussion**

2 “[S]uppression by the prosecution of evidence favorable to an accused upon
3 request violates due process where the evidence is material either to guilt or to
4 punishment, irrespective of the good faith or bad faith of the prosecution.” Brady v.
5 Maryland, 373 U.S. 83, 87 (1963). “[E]vidence is material only if there is a reasonable
6 probability that, had the evidence been disclosed to the defense, the result of the
7 proceeding would have been different. A ‘reasonable probability’ is a probability
8 sufficient to undermine confidence in the outcome.” United States v. Bagley, 473 U.S.
9 667, 682 (1985).

10 “Whatever duty the Constitution imposes on the States to preserve evidence, that
11 duty must be limited to evidence that might be expected to play a significant role in the
12 suspect’s defense. To meet this standard of constitutional materiality, evidence must
13 both possess an exculpatory value that was apparent before the evidence was destroyed,
14 and be of such a nature that the defendant would be unable to obtain comparable
15 evidence by other reasonably available means.” Trombetta, 467 U.S. at 488-89
16 (footnote and internal citation omitted). In Youngblood, the Supreme Court further held
17 that “unless a criminal defendant can show bad faith on the part of the police, failure to
18 preserve potentially useful evidence does not constitute a denial of due process of law.”
19 488 U.S. at 58.

20 Petitioner asserts that: “When taken together, the trio of *Brady*, *Trombetta*, and
21 *Youngblood*, set up a tripartite test for determining the government’s duty to preserve
22 and disclose evidence depending on the strength of the exculpatory character of the
23 evidence.” (FAP at 156.) He argues that: “The distinctions between the three tests are
24 significant in this case because as the investigation progressed, as the prosecution
25 learned more about the exculpatory nature of the bloody print on the door jamb, its duty
26 to preserve the print became more exacting. From the moment the prosecution learned
27 that the bloody print on the door jamb was not Mr. Roybal’s, that evidence became
28 material exculpatory evidence which the prosecution was bound to preserve, disclose,

1 and make available for examination to the defense.” (Id.)

2 The trial court held that the doorjamb had “no exculpatory value” for Petitioner,
3 stating that: “The print, patent that it is, I’m satisfied is not of sufficient quality for any
4 qualified examiner to render an opinion that it does or does not belong, that is match,
5 with known prints or exemplars, . . .” (PRT 196.) The trial court stated that: “It’s
6 essentially a piece of neutral evidence in terms of its forensic value, that is its fingerprint
7 value, and accordingly, I also conclude that the investigating agency had no knowledge
8 of its exculpatory nature.” (Id.) The trial court also concluded that the “far better
9 evidence is the photograph of the bloody palm print on the door jamb, and of course that
10 is available,” that the photo was “comparable evidence, in fact better evidence” than the
11 doorjamb, and reiterating that the print was insufficient for identification purposes.

12 (PRT 197.) The trial court also concluded there was no proof of bad faith,⁷ stating that
13 “this is probably an administrative screw up,” as the police had followed procedures and
14 “this door jamb has been somehow been misplaced or misfiled.” (Id.)

15 These conclusions appear reasonable. Smith indicated, through an offer of proof,
16 that the doorjamb was better evidence than the photograph, as the original item would
17 contain greater detail, and that “the photograph of the bloody print was limited in its
18 usefulness.” (PRT 33-34.) However, Sypnicki, who examined both items, stated that
19 while neither the photo nor the doorjamb was particularly good evidence, the photo was
20 sufficient for comparison purposes. (PRT 50, 55-57.) Specifically, Sypnicki stated that:
21 “Well, I looked at the print on the door frame that had been dusted, and I found that that
22 was of absolutely no value whatsoever. By the time it had been dusted, it was more or
23 less a black smudge.” (PRT 61.) He noted that the photos were better, as: “That shows
24 the print in its unadulterated form. It hasn’t been touched, It’s just a straight photo, one-
25 to-one photo of a fingerprint or palm print.” (PRT 68.) He also indicated that, in his
26 opinion, neither the doorjamb nor the photos was very useful for either eliminating or

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28 ⁷ The trial court also allowed defense counsel to offer argument that the police
destroyed the print in bad faith by applying fingerprint powder to the doorjamb. (PRT
189.)

1 identifying anyone, and that he was not able to either match or eliminate Petitioner as the
2 donor of the print. (PRT 58-59, 69-70.) It is apparent from the record that this evidence
3 merely was not inculpatory as to Petitioner, rather than being exculpatory, and the trial
4 judge reasonably concluded that the lost doorjamb itself was “essentially a piece of
5 neutral evidence.” (PRT 196.)

6 Freiberg photographed the print at the crime scene in June 1989, unsuccessfully
7 attempted to lift and preserve it by applying powder, and attempted to illuminate it to
8 obtain more detail. (PRT 93-95.) Freiberg agreed that the print was “not a real good
9 quality” print, stating that “the print was of a marginal quality.” (PRT 99, 118.) Freiberg
10 also later performed a quick comparison of the print to an inked print card provided by
11 Detective Trotter, and recalled telling Trotter that he could not say whether the prints
12 were a match. (PRT 97-99, 118.) Trotter affirmed Freiberg’s statement, testifying that:
13 “He said he felt it was not Roybal’s prints.” (PRT 126.) Trotter relayed that information
14 to Detective Hancock, whose notes indicated that: “Bloody print is not Roybal’s. None
15 of the other prints belong to Roybal.” (PRT 155-57.) Hancock’s later written report
16 stated the print “did not appear” to be Roybal’s. (PRT 161.)

17 With respect to the loss of the doorjamb, Detective Hancock stated that the
18 doorjamb was removed from the victim’s home on June 22, 1989, she took it to the
19 Department of Justice for Sypnicki’s examination on June 23, that she was present for
20 the testing, and afterwards, she booked the item into evidence on September 21, 1989.
21 (PRT 143-47.) Between June 23 and September 21, the item was locked in the Sheriff’s
22 facility. (PRT 147.) Hancock last saw the doorjamb in January or February of 1991, just
23 prior to the police department’s move to a new evidence facility; when she accompanied
24 defense counsel to the new evidence facility in November 1991, they were unable to
25 locate the item. (PRT 147-50.) Sergeant Krunglevich, who administered the evidence
26 and property clerks, stated that they located the tag for the doorjamb, which showed that
27 the item had not been removed from the facility after it was booked into evidence in
28 September 1989. (PRT 173-78.) Krunglevich noted that the police department moved

1 to a new evidence facility in February 1991, while he became aware that the item was
2 missing two months prior to the February 1992 hearing, and the misfiled box that
3 previously held the doorjamb had been located one month prior. (PRT 179, 181-82.)
4 The police department had conducted unsuccessful searches looking for the item, and
5 there had not been any similar loss or inability to find evidence. (PRT 182.) The
6 department had procedures in place for storing evidence, and Krunglevich stated that
7 those procedures had been followed. (PRT 183.)

8 As noted previously, the California Supreme Court rejected Petitioner's claim of
9 error, reasoning:

10 [T]he superior court did not err in concluding that the evidence at issue did
11 not possess an exculpatory value that was apparent before it disappeared;
12 the print may or may not have been defendant's and may or may not have
13 been the perpetrator's. Nor did it err in concluding that the disappearance
of the doorjamb was inadvertent and not the product of bad faith conduct
by the police; indeed, nothing in defendant's offer of proof disputed such
a conclusion.

14 Roybal, 19 Cal. 4th at 510.

15 Petitioner now argues that once the police knew that Petitioner had been excluded
16 as a donor of the bloody print, they had a duty to preserve the evidence, and alleges that
17 the police and prosecution acted in bad faith in losing the evidence and misleading the
18 trial court about its value. (FAP at 159-60.) Petitioner also asserts the doorjamb
19 evidence was "uniquely exculpatory" in comparison to the photos of the print. (Id. at
20 164.) First, a review of the testimony presented at the pre-trial hearing does not reflect
21 that the trial court erred in concluding the doorjamb was not exculpatory. Again, both
22 Sypnicki and Freiberg testified that the evidence was not of a good quality, and Sypnicki
23 opined that the evidence would not be useful for identification or elimination.
24 Meanwhile, Smith's offer of proof at the hearing did not include any testimony about
25 whether Petitioner's prints matched or did not match the evidence, while Freiberg's brief
26 review of the prints did not match them to Petitioner, and Sypnicki testified that he was
27 unable to either exclude or match the print to Petitioner.

28 Petitioner argues that the trial testimony shows that the prosecution misled the trial

1 court about the evidentiary value of the doorjamb, and asserts that trial testimony
 2 revealed that, “Sypnicki did indeed eliminate Mr. Roybal as the donor of the print,
 3 assuming that it was a fingerprint, as opposed to a palm print, which he agreed it most
 4 likely was.” (See FAP at 164, citing Reporter’s Transcript [“RT”] 3592-93.) A review
 5 of the record does not support Petitioner’s assertion. At one point during the
 6 examination, Sypnicki stated that he felt he “could eliminate the fingerprints, but not the
 7 palm prints” of known exemplars, including Petitioner’s, as having made the print on the
 8 doorjamb, but went on to clarify that: “Wherever that print was, that print I couldn’t
 9 make or I would say I couldn’t find anything at all that would lead me to believe that it
 10 could be those people. But that print could very well be a portion of a palm, and that part
 11 I can’t, on the known prints, I wouldn’t eliminate anybody.” (RT 3595-96.) Sypnicki
 12 reaffirmed several times that, due to the poor quality of the print, he was unable to
 13 eliminate either Petitioner or Mr. Weden, the victim’s husband, as donors of the print on
 14 the doorjamb; this conclusion was also clearly reflected in his written report. (See RT
 15 3597-98, 3600-01.)⁸

16 The Court also remains unpersuaded that the doorjamb was “uniquely”
 17 exculpatory. Defense expert Smith testified, via the offer of proof, that he believed the

18
 19 ⁸ Indeed, Sypnicki and defense counsel had the following exchange about
 20 Sypnicki’s report and opinion, during which Sypnicki again affirmed his inability to
 either exclude or include Petitioner as the donor of the print:

21 Q: In that report, what do you say about eliminating or including
 Rudolph Roybal as the donor of the print on the doorjamb?

22 A: In my summary on that report, and I’ll read it, it says: “Examination
 23 has determined that due to the lack of clear ridge detail, the visible
 24 impression appearing in the photograph marked item B can neither
 be eliminated nor identified as having been made by the fingers or
 palms of subject Rudy Roybal.”

25 Q: Then it is your testimony that, with respect to Rudolph Roybal, you
 26 cannot eliminate him as the donor of the print on the doorjamb; is
 that correct?

27 A: That’s what I stated. Maybe it wasn’t too clear, but that’s what I
 28 mean.

(RT 3597-98.)

1 doorjamb was better evidence than the photo because it was likely to provide more
2 detail, as it was the original surface of the print. However, Sypnicki, who actually
3 examined both the photos and the doorjamb, opined that neither item was particularly
4 good evidence, and that the photo actually showed more detail than the doorjamb, which
5 had been dusted with fingerprint powder in an attempt to lift the print. The trial court
6 reasonably credited Sypnicki's testimony. Petitioner also argues that the doorjamb
7 would have provided additional evidence in support of his defense that someone else had
8 committed the crime, and had done so while wearing gloves; testimony in support of this
9 theory was presented at trial. (FAP at 164-65.) Petitioner cites to conflicting expert trial
10 testimony about whether the photographs reflect visible sweat pores, and argued that the
11 doorjamb would have provided evidence superior to that from the photos. However, it
12 is clear that the preserved photographs allowed the experts to examine the evidence and
13 testify on the matter. Petitioner only speculates that an examination of the doorjamb
14 could have revealed additional evidence that could have further supported the defense
15 theory; this assertion is insufficient to show that the doorjamb was in fact exculpatory.
16 See Youngblood, 488 U.S. at 57 ("The Due Process Clause of the Fourteenth
17 Amendment, as interpreted by *Brady*, makes the good or bad faith of the State irrelevant
18 when the State fails to disclose to the defendant material exculpatory evidence. But we
19 think the Due Process Clause requires a different result when we deal with the failure of
20 the State to preserve evidentiary material of which no more can be said than that it could
21 have been subjected to tests, the results of which might have exonerated the defendant.")
22 Moreover, irrespective of Petitioner's assertions as to the evidentiary value of the
23 doorjamb, the loss or destruction of that item did not leave Petitioner without
24 "comparable evidence," in the form of the photographs, that he could use in his defense.
25 See Trombetta, 467 U.S. at 489.

26 Indeed, despite the loss of the doorjamb evidence, several experts testified at trial
27 about whether Petitioner was included or excluded as a donor of the print based on their
28 examination of the photographs. As discussed, Sypnicki testified at trial that he could

1 not eliminate or identify Petitioner as having made the print on the doorjamb. (RT 3597-
2 98.) Larry Harper, an FBI print examiner, compared the photographed print to those of
3 Petitioner, as well as other individuals, and testified that he eliminated Petitioner and the
4 other known individuals from having made the print. (RT 3518-20.) Harper could not
5 eliminate the victim as a donor, explaining that her prints were not clearly recorded, and
6 acknowledged that taking prints from a person with arthritis could be difficult. (RT
7 3520-21.) Defense expert Smith testified that he compared the prints of Mr. Weden and
8 Petitioner to the photographed print, and was able to exclude both individuals as the
9 donor of the print. (RT 4267-72.) Smith was also able to exclude some of the victim's
10 fingers as having made the prints, but not others, given the condition of the victim's
11 rolled prints. (RT 4268-69.) The defense also called Freiberg, Trotter, and Hancock to
12 testify about Freiberg's brief comparison of the prints; as at the pre-trial hearing,
13 Freiberg again indicated that he was unable to match the print on the doorjamb to the
14 known prints, Trotter stated that Freiberg indicated the prints were not a match, and
15 Hancock again testified that her understanding of the results of the comparison was that
16 the print was not Petitioner's. (RT 4380-82 (Freiberg), 4536-39 (Trotter), 4548-49
17 (Hancock).) Thus, the primary exculpatory evidence presented and argued at the pre-
18 trial hearing, that Petitioner's prints did not match the print on the doorjamb, was
19 ultimately introduced into evidence at trial.

20 Petitioner contends that the trial court's conduct of the pre-trial hearing and refusal
21 to provide the jury with a curative instruction violated his constitutional rights, and that
22 the trial court's refusal to allow Smith to observe Sypnicki's testimony violated a myriad
23 of constitutional rights, including his right to due process, to effective assistance of
24 counsel, and to confront and cross-examine witnesses. (FAP at 175.) He also asserts
25 that the trial court's refusal to allow the defense to cross-examine Sypnicki about proper
26 procedures to preserve the print violated due process. (*Id.* at 177.) The California
27 Supreme Court rejected this claim on appeal, reasoning as follows:

28 Defendant also claims that the superior court erred by refusing to permit
him to call witnesses or to allow his expert to observe the examination of

1 the prosecution's expert, by limiting cross-examination of Sypnicki about
2 specific forensic techniques, and by refusing to give his proposed
3 instruction. The claims are unavailing; the superior court properly
concluded that the evidence did not, in any event, have apparent
exculpatory value.

4 Roybal, 19 Cal. 4th at 510.

5 With respect to the trial court's refusal to allow Smith to observe the testimony of
6 Sypnicki, as the Court has determined in the section above, the trial court acted within
7 its discretion in excluding witnesses from the courtroom. Moreover, as previously noted,
8 the original request to exclude witnesses came from the defense. Petitioner fails to
9 demonstrate that the trial court's ruling amounts to error of a constitutional dimension.
10 See Estelle v. McGuire, 502 U.S. 62, 68 (1991) ("[I]t is not the province of a federal
11 habeas court to reexamine state-court determinations on state-law questions.")

12 Regarding the trial court's refusal to allow the defense to cross-examine Sypnicki
13 about proper print-taking procedures, Petitioner fails to show that any error in limiting
14 the cross-examination resulted in prejudice. While the trial court held the procedural
15 questions were not relevant to the noticed motion insofar as it was based on the loss of
16 the doorjamb, the trial court still allowed the defense to argue that Freiberg's decision
17 to apply powder to the print was evidence of bad faith. (See RT 188-89.) In any event,
18 the ultimate issue at the hearing was whether exculpatory evidence had been lost or
19 destroyed, and Petitioner fails to demonstrate that allowing him to question Sypnicki on
20 procedures would have resulted in a different outcome, as there was no dispute that the
21 evidence had been lost or destroyed. Given that the trial court allowed defense argument
22 on bad faith despite the tenuous relevance to the issue at hand, Petitioner fails to show
23 that the trial court's ruling limiting cross-examination on this subject rose to the level of
24 constitutional error. See McGuire, 502 U.S. at 68.

25 Finally, Petitioner asserts that the trial court's refusal to provide the jury with a
26 curative instruction, and in particular, the court's rejection of his proposed jury
27 instruction, was erroneous. As previously noted, at the conclusion of the pre-trial
28 hearing, the court held that a curative instruction was not warranted because the defense

1 failed to meet the standards set forth in Youngblood and Trombetta with respect to the
 2 doorjamb. (See RT 197.) The trial court also stated that: “This will not prevent - - this
 3 ruling will not prevent questioning before the jury concerning the print. It may be
 4 somewhat embarrassing to the prosecution and the investigating officers, but that’s life.”
 5 (RT 198.) During the discussion on guilt-phase jury instructions, the defense proposed
 6 the following instruction:

7 There is evidence in this case the Oceanside Police Department lost
 8 the doorjamb containing the bloody print. In considering any prosecution
 9 argument, the print on the doorjamb was not in blood, you should keep in
 10 mind it was the police department’s loss of the doorjamb that made testing
 11 for blood impossible.

12 Further, in considering the quality of the bloody print and the ability
 13 of the experts to examine it, you should keep in mind it was the police error
 14 in powdering the bloody print that prevented use of other methods, such as
 15 super glue, ninhydrin, and laser examination from being used to enhance
 16 the print.

17 Further, in considering the testimony of the fingerprint experts, you
 18 should consider the prosecution obtained Deputy Freiberg, Joseph
 19 Sypnicki, and Larry Harper.

20 (RT 4741-42.) The prosecution contended the requested instruction was argumentative,
 21 and the trial court stated: “My inclination is to sustain the objection. You can argue
 22 this.” (RT 4742.) After brief discussion about a proposed modification to the
 23 instruction, the trial court refused the instruction. (RT 4743.) The defense also proposed
 24 several other instructions about the poor quality of prints obtained from the victim, the
 25 police failure to seize latex gloves from the trash, and allowing the victim’s family into
 26 the home to clean a few days after the crime- each of these proposed instructions were
 27 also refused as argumentative. (RT 4744-53; 4825.) Defense counsel and the trial court
 28 then had the following exchange:

29 Mr. Campbell: Your Honor, maybe it would be helpful if I inquire.
 30 The defense would like to get some instruction along
 31 Zamora lines. I can make these - - try to make these
 32 instructions less argumentative. My goal is to draw the
 33 jury’s attention to the fact that evidence was lost here
 34 by the prosecution and it prejudiced the defense, and
 35 thats [sic] something it ought to consider.

36 The Court: I think the only thing I can tell you, Mr. Campbell, is
 37 that I have to have a written proposed instruction upon

1 which to rule, and I don't have that right now.

2 Mr. Campbell: All right, I understand. Thank you.

3 (RT 4825-26.)

4 The California Supreme Court found as follows:

5 At the close of evidence, defendant verbally requested an instruction to the
6 effect that the police department's loss of the doorjamb made testing the
7 print for blood impossible and police error prevented use of various
8 forensic methods to enhance the print. The superior court rejected the
proposed instruction as argumentative, but did not preclude defendant from
submitting a written proposed instruction concerning the doorjamb.
Defendant did not do so.

9 Roybal, 19 Cal. 4th at 509. The California Supreme Court rejected Petitioner's claim of
10 instructional error, reasoning that: "In light of its conclusion that the evidence did not
11 have apparent exculpatory value, it was also not error for the superior court to refuse
12 defendant's proposed instruction on the ground that it was argumentative." Id. at 511.

13 Given the trial court's reasonable conclusion that the doorjamb was not
14 exculpatory, Petitioner fails to demonstrate that refusing the proposed instruction was
15 erroneous, much less that it amounted to error of a constitutional dimension. See
16 McGuire, 502 U.S. at 68. Even assuming there was error, Petitioner fails to demonstrate
17 that the absence of this instruction had any impact on the outcome of the guilt phase
18 proceedings. See Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (habeas relief not
19 available unless error had a "substantial and injurious effect or influence in determining
20 the jury's verdict.") At the pre-trial hearing, the trial court explicitly noted that the
21 defense could question witnesses about the print. (PRT 198.) While rejecting the later-
22 proposed instruction, the trial court again specifically indicated that the defense was free
23 to argue the matter, stating: "My inclination is to sustain the objection. You can argue
24 this." (RT 4742.)

25 In opening arguments, defense counsel argued at length about the print on the
26 doorjamb- not only that the prints did not match Petitioner's, but also about the
27 processing and collection of the evidence, its loss, and the comparison of the print to
28 both the prints of the victim and those of the victim's husband, and argued that the print

1 belonged not to any of those three individuals, but belonged to the real killer. (RT 2619-
2 24, 2627.) The defense reiterated that the doorjamb itself was missing and then
3 discussed the photographs taken of the print as follows:

4 Now, realizing this was a very important print because the inference was
5 obvious that it must have belonged to the killer or Yvonne Weden, realizing
6 the significance of this print, the Sheriff's crime lab criminalist, Fred
Freiberg, first photographed the print. And thank God he did because at
this point that's the only evidence we have of this bloody print.

7 (RT 2619-20.) The defense also addressed the police department's handling of the print,
8 arguing:

9 Mr. Freiberg, although he is an experienced criminalist and
10 somewhat of a fingerprint expert, put this black powder on the bloody print
11 on the door jamb. This was a mistake. That's not how you're supposed to
12 handle prints like that because that bloody print was not a latent print, this
is to say invisible, that you can make visible only with the application of
powder or some other substance. Rather it was a patent print, a print that
you can see with the eye even before you treated it. You don't put powder
on those prints, but Mr. Freiberg did.

13 At that point or some point later, apparently realizing the mistake had
14 been made, the door jamb itself was seized in the hopes that maybe the
powder could be removed or something retrieved from this bloody print.

15 (RT 2620.)

16 During the guilt phase, the defense elicited testimony from Freiberg about
17 powdering the print; while Freiberg testified that the powder would not have interfered
18 with later efforts to test the doorjamb for blood, the defense elicited that no such tests
19 had been done prior to the loss of the doorjamb, and that the doorjamb had not been
20 located. (RT 3675-77.) Similarly, the defense elicited testimony from Detective
21 Hancock about the storage of the doorjamb at the police department's evidence facility,
22 the move to a new evidence facility, that the doorjamb was noted missing in November
23 1991, and the inability to locate the doorjamb despite repeated searches. (RT 4123-28.)

24 The defense also questioned Sypnicki about procedures, and Sypnicki testified that
25 he would not have powdered the print after photographing it, but instead would have
26 attempted to examine the print first, then would have tried light and other chemicals prior
27 to powder. (RT 3181-85.) FBI analyst Harper similarly stated that he would apply
28 powder last, after first photographing the print and then attempting to use chemicals.

1 (RT 3529.) In closing, the defense again criticized the processing of the scene, arguing
2 that: “Now, there’s obviously the fact that the latex gloves were not seized. I’ll come
3 back to that. There’s the fact that the bloody print was first powdered, which destroyed
4 it for purposes of all other testing. There’s the fact that the doorjamb itself was lost. But
5 there were other mistakes too.” (RT 4950.) The defense asserted: “That bloody print
6 was not Rudolph Roybal’s and it was not Paul Weden’s. We know that from the experts
7 who testified here.” (RT 4954.) The defense then engaged in an extended discussion
8 on the bloody print and the expert testimony comparing the print to known prints. (RT
9 4954-57.) The defense also pointedly noted that the inability to test the print for blood
10 was due to its loss, arguing that: “Now, it is true that I can’t prove to you by a scientific
11 test that the bloody print, I’m calling it the bloody print because it was a bloody print,
12 was in blood, and that’s because the doorjamb has been lost.” (RT 4957-58.) The
13 defense also argued that the print belonged to the perpetrator of the crime and discussed
14 the problems the experts had encountered in comparing the print to those of the victim,
15 given the quality of the victim’s prints. (RT 4958-60.) The defense again advanced its
16 theory that the print had been made by the perpetrator, an individual wearing gloves, and
17 argued at length about latex gloves in a garbage can that had been photographed by
18 police but had not been seized. (RT 4961-67.)

19 Thus, in light of the fact that the jury was presented with expert testimony that the
20 print did not match Petitioner, testimony and argument about the loss of the doorjamb,
21 and the resultant inability to test it for further evidence, Petitioner fails to demonstrate
22 that the trial court’s rejection of the proposed instruction covering similar ground had a
23 “substantial and injurious effect or influence in determining the jury’s verdict.” Brecht,
24 507 U.S. at 637. Petitioner fails to demonstrate that the California Supreme Court’s
25 rejection of this claim was either contrary to, or an unreasonable application of, clearly
26 established federal law, or that it was based upon an unreasonable determination of the
27 facts. Petitioner is not entitled to habeas relief on Claim 1.

28

1 **2. Claim 2**

2 Petitioner contends that the trial court erred in excusing prospective juror Cynthia
3 Steele for cause based on her views about the death penalty, violating his right to an
4 impartial jury, a reliable penalty determination, and due process of law under the Fifth,
5 Sixth, Eighth and Fourteenth Amendments. (FAP at 217.)

6 Petitioner raised this claim on direct appeal, and the California Supreme Court
7 rejected it on the merits, as follows:

8 During voir dire, the superior court granted the prosecution's
9 challenge for cause with regard to prospective juror Cynthia Steele, on the
10 ground that she "clearly stated that her religious convictions prevent her
11 from voting for the death penalty." Juror Steele indicated in a written
12 questionnaire that the death penalty was against her religious beliefs. In
13 response to the question, "In what types of cases/offenses do you feel the
14 death penalty should be imposed?," she wrote: "In some of these case[s],
15 when a person kill (sic) 5 or 7 people, but really can't say because it really
16 isn't right to take another person[s] life." In voir dire, she gave consistent
17 answers. When asked by the superior court: "Would your religious
18 conviction prevent you from voting for a death penalty in this case knowing
19 what you know about the legal procedures here? Would you be precluded,
20 would you absolutely not vote for the death penalty because of your
21 religious convictions," she responded: "Yeah, I wouldn't vote for that. I
22 wouldn't-I-I would for guilty, but I-I wouldn't feel right. Because like I say,
I'd be taking another person's life and I wouldn't feel right." Asked to give
a "yes" or "no" answer to the same question, she said: "Yes." When asked,
at the request of defense counsel, whether she had "some situation in mind
where you think the death penalty might be appropriate," she answered:
"Yes. Yes, like that case of that-that guy kills people, I can't think of his
name, and he cut them up and ate parts of their body. . . . I'm not crazy
about the death penalty but that was really bad." When the superior court
repeated the question whether she would be unable to vote for the death
penalty in this case, however, she again answered in the affirmative. The
superior court denied a request by defense counsel to ask her whether she
would "have an open mind" with respect to considering the death penalty
"if in this case it were proven the defendant intentionally killed a
65-year-old woman in the course of a burglary of her house."

23 Defendant claims that the superior court erred in excusing
24 prospective juror Steele for cause. He contends that the record supports
25 only a conclusion that she had some religious scruples about the death
penalty, not blanket opposition thereto. He argues that her answer to the
superior court's question regarding whether she would vote for the death
penalty in this case did not support a challenge for cause. The point fails.

26 The question on review of this claim is whether exclusion was
27 warranted because the juror's views concerning capital punishment would
28 "prevent or substantially impair the performance of his duties as a juror . .
." (Wainwright v. Witt (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 852, 83
L.Ed.2d 841]; accord, People v. Samayoa (1997) 15 Cal.4th 795, 822 [64
Cal.Rptr.2d 400, 938 P.2d 2].) "When a juror's views are conflicting or
ambiguous, the trial court's determination as to his or her state of mind

generally is binding on a reviewing court. When there is no inconsistency, but simply a question whether the juror's responses demonstrated a bias for or against the death penalty, the trial court's judgment will not be set aside if supported by substantial evidence." (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 822.) Questions directed to a juror's attitudes toward the particular facts of the case are not relevant to the death-qualification process; however, "a court may properly excuse a prospective juror who would automatically vote against the death penalty in the case before him, regardless of his willingness to consider the death penalty in other cases." (*People v. Pinholster* (1992) 1 Cal.4th 865, 917-918 [4 Cal.Rptr.2d 765, 824 P.2d 571].)

The record supports the superior court's determination that prospective juror Steele harbored views unfavorable toward the death penalty that would substantially have impaired her ability to sit as a juror. She repeatedly stated that she would not vote for the death penalty "in this case," i.e., a case involving a single victim. She explained that she might do so, albeit reluctantly, only in an extreme case, such as, for example, one involving multiple victims and cannibalism. The questioning by the superior court properly elicited her views about the death penalty in the abstract; the particular facts of the case were not presented to her. Indeed, the superior court refused to permit defendant to also ask about her views regarding the specific case, i.e., whether she would have an "open mind" with respect to considering the death penalty for a person who killed a 65-year-old woman in the course of a residential burglary.

Roybal, 19 Cal. 4th at 518-19 (footnote omitted).

"[T]he proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424 (1985), quoting Adams v. Texas, 448 U.S. 38, 45 (1980).

"[W]hether a venireman is biased has traditionally been determined through *voir dire* culminating in a finding by the trial judge concerning the venireman's state of mind. We also noted that such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province. Such determinations were entitled to deference even on direct review; '[t]he respect paid such findings in habeas proceeding certainly should be no less.'" Witt, 469 U.S. at 428, quoting Patton v. Yount, 467 U.S. 1025, 1038 (1984) (footnote omitted); see also Uttecht v. Brown, 551 U.S. 1, 9 (2007) ("Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals that compose it, a factor of critical

1 importance in assessing the attitudes and qualifications of potential jurors.”)

2 After recounting several answers provided in Steele’s written questionnaire, the
3 trial court inquired on voir dire as to her views about the death penalty, as follows:

4 [The Court]: Do you have a firm religious conviction that taking another’s
5 life is wrong or not justified?

6 A: I think it’s unjustified. I feel it’s unjustified.

7 Q: Unjustified?

8 A: Unjustified, yeah.

9 Q: All right. Would your religious conviction prevent you from voting
10 for a death penalty in this case knowing what you know about the
11 legal procedures here? Would you be precluded, would you
absolutely not vote for the death penalty because of your religious
convictions?

12 A: Yeah, I wouldn’t vote for that. I wouldn’t - - I - - I would vote for
13 guilty, but I - - I wouldn’t feel right. Because like I say, I’d be taking
another person’s life and I wouldn’t feel right.

14 Q: You’ve - - I need to ask the question because I need a “yes” or “no”
answer, believe me.

15 A: All right.

16 Q: Would your religious convictions prevent you from voting for the
17 death penalty in this case?

18 A: Yes.

(RT 2241-42.) After the prosecution’s challenge for cause, the trial court asked if
19 defense counsel had additional questions, and the defense noted that Ms. Steele seemed
20 to indicate in her questionnaire that there may be situations for which she did not oppose
21 the death penalty. Upon inquiry, Steele referenced the infamous Dahmer case, involving
22 both multiple murder and cannibalism, stating that, “I’m not too crazy about the death
23 penalty, but that was really bad.” (RT 2242-43.) The Court then inquired:

24 Q: Now, in that situation you would consider voting for the death
25 penalty?

26 A: Yeah, yes.

27 Q: All right. This case is not going to involve cannibalism.

28 A: Okay.

1 Q: Not that I know of. Now, knowing that, that this case will not
2 involve cannibalism, just from the little you've heard about the case,
3 do your religious convictions tell you not to vote for the death
4 penalty?

5 A: Wait a minute. Okay. What I meant is, like not too crazy about the
6 death penalty, but I'll do it if I was a juror, but I'm saying it would
7 bother me. I'd probably have nightmares, I'd feel - - let's see.

8 Q: Would you be unable to vote for the death penalty in this case?

9 A: Yes.

10 (RT 2243-44.) The trial court excused Steele from the venire, stating: "All right. The
11 prosecution's challenge for cause is granted. I'll make a finding that Ms. Steele has
12 clearly stated that her religious convictions prevent her from voting for the death penalty
13 in this case." (RT 2245.)

14 Petitioner contends that Steele's answers, and general opposition to the death
15 penalty, was insufficient to support the challenge for cause. (FAP at 186-87.) He asserts
16 that the trial court's inquiry into whether Steele was able to vote for death penalty "in
17 this case" ran counter to the Supreme Court's directions in Witherspoon, which directed
18 that such inquiry should be in the abstract. (FAP at 188, citing Witherspoon, 391 U.S.
19 at 533 fn. 21.)⁹ Petitioner argues that Steele was not so opposed to the death penalty that
20 she should have been excluded, and that the state court's rejection of this claim on direct
21 appeal was an unreasonable application of the law to the facts under section 2254(d)(2).
22 (FAP at 188.)

23 The Witherspoon Court stated that "a prospective juror cannot be expected to say
24 in advance of trial whether he would in fact vote for the extreme penalty in the case
25 before him." Id., 391 U.S. at 523 n. 21. However, the trial court did not allow inquiry
26 into the juror's views about the specific facts of Petitioner's case, and rebuffed defense
27 attempts to pose pointed questions referencing the victim's age, gender, and other
28 particular circumstances of the crime, stating that: "I've asked her and she knows from
listening to my questions to the other jurors here in her presence what the procedure is,

⁹ It appears Petitioner may be referring to page 523 of the majority opinion, which contains footnote 21, rather than page 533 as cited, which is part of a dissenting opinion.

1 the nature of the case and so forth.” (RT 2244.) The record also clearly reflects that
2 Steele was aware of the nature of the case, as the prosecutor read the Amended
3 Information, outlining the charges brought against Petitioner, to each group of
4 prospective jurors. (See RT 2196-99.) Instead, as the state court reasonably noted, the
5 trial court’s use of the term “in this case” was used to distinguish the general nature of
6 the case, and Steele “repeatedly stated that she would not vote for the death penalty ‘in
7 this case,’ i.e. a case involving a single victim,” as opposed to a case involving “multiple
8 victims and cannibalism,” in which she could conceivably consider a death sentence.
9 Roybal, 19 Cal. 4th at 519.

10 Prospective juror Steele did not merely voice a general opposition to the death
11 penalty, but instead repeatedly affirmed an unwillingness to consider it or vote for it in
12 all but the most “extreme” situations. “[D]eference must be paid to the trial judge who
13 sees and hears the juror.” Witt, 469 U.S. at 426. After extended inquiry, the trial court
14 concluded “that Ms. Steele has clearly stated that her religious convictions prevent her
15 from voting for the death penalty in this case.” (RT 2245.) Petitioner fails to
16 demonstrate that the trial court’s conclusion was unreasonable, and the Court finds
17 record support for the trial court’s decision given Steele’s clearly stated opposition to the
18 death penalty and unwillingness to vote for it in all but only the most “extreme” case.
19 See Witt, 469 U.S. at 434 (“[T]he question is not whether a reviewing court might
20 disagree with the trial court’s findings, but whether those findings are fairly supported
21 by the record.”), citing Marshall v. Lonberger, 459 U.S. 422, 432 (1983).

22 Contrary to Petitioner’s contention, “[t]he trial court’s finding of bias was made
23 under the proper standard, was subject to § 2254(d), and was fairly supported by the
24 record.” Witt, 469 U.S. at 435. Accordingly, the state court’s rejection of this claim on
25 appeal was neither contrary to, nor an unreasonable application of, clearly established
26 federal law, nor was it based upon an unreasonable determination of the facts. Petitioner
27 is not entitled to habeas relief on Claim 2.

28

1 **3. Claim 14**

2 Petitioner alleges that the trial court erred in instructing the jurors that an
3 aggravating factor, “standing alone,” could support a death sentence, arguing that the
4 instruction “effectively told the jurors that one aggravating factor alone could override
5 the duty to compare the evidence in aggravation with evidence in mitigation,” in
6 violation of his constitutional rights to due process and a reliable penalty determination.
7 (FAP at 301.)

8 The California Supreme Court considered and rejected this claim on direct appeal,
9 reasoning as follows:

10 After listing the penalty factors of Penal Code section 190.3 for the
11 jurors, the superior court instructed: “These various factors in aggravation
12 and mitigation may be assigned different weights by you. Thus, it is not the
13 number of factors necessarily, but also the weight you assign to them which
14 should control. For instance, you could find that one specific factor on one
15 side weighs so heavily in your consideration that it outweighs all of the
16 determined factors on the other side. . . . Any aggravating factor, standing
17 alone, may be sufficient to support a decision that death is the appropriate
18 punishment. [¶] If a mitigating circumstance or aspect of the defendant’s
19 background or character arouses sympathy and compassion in you, you may
20 consider that a circumstance in mitigation and impose life in prison without
21 possibility of parole instead of the death sentence. [¶] Any mitigating factor
22 standing alone may be sufficient to support a decision that life without
23 possibility of parole is the appropriate punishment.”

24 Defendant claims the superior court erred. He argues that the
25 instruction was inconsistent with Penal Code section 190.3, which requires
26 jurors to consider the aggravating and mitigating circumstances and to
27 impose a sentence of death if it concludes that the aggravating
28 circumstances outweigh the mitigating circumstances. He concedes that a
 juror could properly decide that one aggravating factor outweighed
 everything else and warranted a sentence of death. He contends, however,
 that the superior court’s instruction was misleading because it referred to
 any aggravating factor “standing alone.” He insists that the phrase
 “standing alone” means “by itself, without reference to anything else,” and
 that jurors were thus instructed that they could altogether ignore mitigating
 evidence. He is unpersuasive.

 There was no reasonable likelihood that the jurors could have so
 understood the instruction. It did not, as defendant asserts, authorize jurors
 to disregard all mitigating evidence and consider any single penalty factor
 in isolation, i.e., without reference to anything else, in determining penalty.
 On the contrary, the superior court referred to each of the statutory factors
 in mitigation as well as in aggravation, and specifically instructed jurors
 that they could consider all the circumstances, including any sympathetic
 aspect of defendant’s character or background as a mitigating factor. It also
 expressly instructed jurors to weigh all of the relevant factors in
 determining the appropriate punishment, while making it clear that the

1 weighing process should not consist of a merely mechanical process of
 2 comparing the number of aggravating and mitigating factors. In this
 3 context, the phrase “standing alone”^{FN14} did not suggest that jurors could refuse
 4 to consider mitigating evidence.

5 FN14 Because defendant fails to establish that the superior
 6 court erred, his additional claims under the Fifth, Eighth, and
 7 Fourteenth Amendments to the United States Constitution,
 8 which are predicated on such alleged error, also fail.

9 Roybal, 19 Cal. 4th at 521-22 (alterations in original).

10 Clearly established federal law instructs that in order to merit habeas relief on a
 11 claim of state law instructional error, the habeas court must determine “whether the
 12 ailing instruction by itself so infected the entire trial that the resulting conviction violates
 13 due process. McGuire, 502 U.S. at 72, quoting Cupp v. Naughten, 414 U.S. 141, 147
 14 (1973). In this instance, Petitioner argues that the instruction in question was
 15 “misleading” and could have been understood by the jurors as precluding the
 16 consideration of mitigating evidence. (FAP at 301-02.) As such, this Court’s review
 17 must focus on “whether there is a reasonable likelihood that the jury has applied the
 18 challenged instruction in a way that prevents the consideration of constitutionally
 19 relevant evidence.” Boyde v. California, 494 U.S. 370, 380 (1990); see also Buchanan
 20 v. Angelone, 522 U.S. 269, 276 (1998) (“[T]he sentencer may not be precluded from
 21 considering, and may not refuse to consider, any constitutionally relevant mitigating
 22 evidence. . . . However, the State may structure the jury’s consideration of mitigation so
 23 long as it does not preclude the jury from giving effect to any relevant mitigating
 24 evidence.”) (internal citations and quotations omitted.)

25 Additionally, when reviewing an instructional challenge, “[i]t is well established
 26 that the instruction ‘may not be judged in artificial isolation,’ but must be considered in
 27 the context of the instructions as a whole and the trial record.” McGuire, 502 U.S. at 72,
 28 quoting Cupp, 414 U.S. at 147. Even if there was constitutional error, habeas relief is
 unavailable unless that error had a “substantial and injurious effect or influence in
 determining the jury’s verdict.” Brecht, 507 U.S. at 637.

Petitioner contends that the state supreme court’s rejection of this claim is “an

1 unreasonable application of the law to the facts” and that the trial court’s instruction
2 “effectively told the jurors that one aggravating factor alone could override the duty to
3 compare the evidence in aggravation with evidence in mitigation,” and violated the
4 Eighth Amendment. (FAP at 301.) He also asserts that this instructional error, in
5 combination with the prosecutor’s allegedly erroneous statement about weighing, raised
6 as Claim 13 of the FAP, gave the jurors a “profoundly distorted view of California
7 sentencing law.” (Traverse at 97.)

8 Petitioner fails to demonstrate that the contested language directed the jurors to
9 disregard any evidence in mitigation. Reviewing the instructions in context, it is clear
10 that the trial judge explicitly instructed jurors at the commencement of the penalty phase
11 proceedings that their duty was to weigh the evidence in aggravation against that in
12 mitigation in rendering a penalty determination and directed the jurors: “After having
13 heard all of the evidence, and after having heard and considered the arguments of
14 counsel, you shall consider, take into account and be guided by the applicable factors of
15 aggravating and mitigating circumstances upon which you have been instructed.” (CT
16 2051.) At both the outset and conclusion of the penalty phase proceedings, the trial court
17 also specifically instructed the jurors that they must weigh all the evidence before
18 rendering a decision, in accordance with the standard CALJIC instruction, as follows:
19 “Weighing the aggravating and mitigation circumstances does not mean a mere
20 mechanical counting of the factors on each side of an imaginary scale or the arbitrary
21 assignment of weights to any of them. You, the jury, are free to assign whatever moral
22 or sympathetic value you deem appropriate to each and all of the various factors you are
23 permitted to consider. [¶] In weighing the various circumstances, you the jury determine
24 under the relevant evidence which penalty is justified and appropriate by considering the
25 totality of the aggravating circumstances with the totality of the mitigating
26 circumstances. [¶] To return a judgment of death, each of you must be persuaded that
27 the aggravating circumstances are so substantial in comparison with the mitigating
28 circumstances that it warrants death instead of life without parole.” (Compare RT 5308-

09, 6551, CT 2051 with CALJIC 8.88.) This is consistent with California Penal Code section 190.3, which directs that: “After having heard and received all the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.” Cal. Penal Code § 190.3.

The additional instruction given here, that a single factor in aggravation (or mitigation) could on its own support their sentencing decision, did not direct the jurors to disregard the weighing process. Indeed, the “standing alone” instruction was immediately preceded by instructions emphasizing the importance of “the weight” assigned to each factor in both aggravation and mitigation, and instructing that the jurors “could find that one specific factor on one side *weighs* so heavily in your consideration that it *outweighs* all of the determined factors on the other side.” (CT 2122) (emphasis added.) The contested instruction was immediately followed by a discussion of mitigating circumstances and a corresponding instruction that a factor in mitigation, “standing alone,” could be sufficient to support a verdict of life in prison without the possibility of parole. (See CT 2124, RT 6350.) Other instructions continued to emphasize the weighing concept, such as: “I’ve given you an instruction that either aggravating or mitigating factors, one alone is sufficient, it’s a weighing process that you must go through” (RT 6382.) The jurors were properly instructed to consider and weigh all of the evidence in reaching their penalty decision, necessarily and specifically including the evidence in mitigation. The Court finds no “reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.” Boyde, 494 U.S. at 380.

As this contention is without merit, so is Petitioner's contention that the impact of this jury instruction, in combination with the error asserted in Claim 13, resulted in prejudice. This is because, as discussed in the adjudication of Claim 13, Petitioner fails to demonstrate that the prosecutor's statement had any prejudicial impact on the jury's consideration of mitigation. (See Claim 13, *infra*.) The California Supreme Court's rejection of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law, nor was it based on an unreasonable determination of the facts. Petitioner does not merit habeas relief on Claim 14.

4. Claim 15

Petitioner asserts that the trial court erred in giving the jurors contradictory instructions regarding the consideration of prior crimes in aggravation, which allowed the jurors to consider non-statutory criminal acts in aggravation in violation of his constitutional rights. (FAP at 302-04.) Petitioner argues that the trial court gave two contradictory instructions and that "[t]he first told the jurors that 'other uncharged crime or crimes is or are not an aggravating factor and cannot be considered by you for any purpose in aggravation'; but the second, given within the space of a few minutes, told them that they could consider evidence of other crimes if it was proven beyond a reasonable doubt." (*Id.* at 305.)

The California Supreme Court considered and rejected this claim on direct appeal, reasoning as follows:

The parties stipulated that six of defendant's prior felonies were true. The superior court instructed jurors as follows: "Neither the defendant's juvenile criminal history nor any violation of probation incurred by him may be considered or treated by you in aggravation. [¶] Evidence received in the guilt or innocence phase relating to defendant's drug use or possession or related activities ... as well as what may have been produced in the penalty phase or any other uncharged crime or crimes is or are not an aggravating factor and cannot be considered by you for any purpose in aggravation." It then listed defendant's six prior felony convictions, and continued its instruction as follows: "These prior felony offenses have been stipulated to by both the prosecution and the defendant. You may consider such crimes as aggravating circumstances in this case. [¶] These convictions-the conviction of these crimes must be proved beyond a reasonable doubt. [¶] You may not consider any evidence of any other crime as an aggravating circumstance unless such other crime has been proven beyond a reasonable doubt." After defining "reasonable doubt," the

1 superior court continued: “Also, evidence has been introduced for the
 2 purpose of showing that the defendant . . . has committed the following
 3 criminal acts, which involve, or allegedly involve the expressed or implied
 4 use of force or violence or the threat of force or violence.” After listing four
 5 violent criminal acts allegedly committed by defendant, it instructed that
 6 before a juror could consider any of the acts as an aggravating
 7 circumstance, he or she must first be satisfied beyond a reasonable doubt
 8 that defendant committed the act. It then instructed: “A juror may not
 9 consider any evidence of any other criminal acts as an aggravating
 10 circumstance.” Later in the instructions, it reiterated: “. . . I’ve indicated to
 11 you that certain activity, that is, the prior felony convictions and the prior
 12 acts involving threats of violence or violence, must be proved beyond a
 13 reasonable doubt.”

8 Defendant contends that the superior court erred by giving
 9 contradictory and incorrect instructions. He argues that by instructing the
 10 jurors that they may not consider any evidence of “any other crime” unless
 11 it was proven “beyond a reasonable doubt” it improperly permitted them to
 12 consider nonstatutory aggravating circumstances, in violation of his rights
 13 under the Fifth, Eighth, and Fourteenth Amendments to the United States
 14 Constitution. He is unpersuasive.

12 Evidence of nonviolent crimes, except for felony convictions, may
 13 not be considered at the penalty phase. (*People v. Boyd* (1985) 38 Cal.3d
 14 762, 774 [215 Cal.Rptr. 1, 700 P.2d 782].) The instructions at issue did not
 15 authorize the jurors to act inconsistently with that requirement. Taken as a
 16 whole, the instructions were neither contradictory nor incorrect. In context,
 17 the jurors would reasonably have understood that they could consider in
 18 aggravation only the felonies stipulated to by defendant and the
 19 prosecution, and criminal acts referred to by the superior court, and then,
 20 only if those six felonies and four criminal acts were proven beyond a
 21 reasonable doubt. There is no reasonable likelihood that the jurors would
 22 have understood that they could consider any other crimes or criminal
 23 activity in aggravation.

19 Roybal, 19 Cal. 4th at 526-27 (alterations in original).

20 Based on a review of this instruction in the proper context of the instructions and
 21 trial as a whole, it is clear that the statement directing that jurors could not consider
 22 evidence of “any other crime” unless it was proven beyond a reasonable doubt applied
 23 only to those other crimes specifically enumerated by the trial court. See McGuire, 502
 24 U.S. at 72 (“It is well established that the instruction ‘may not be judged in artificial
 25 isolation,’ but must be considered in the context of the instructions as a whole and the
 26 trial record.”), quoting Cupp, 414 U.S. at 147. Immediately following the contested
 27 statement, the trial court recited the list of prior felony convictions and relevant law, and
 28 clearly outlined the four criminal acts alleged, instructing that: “Before a juror may
 consider any of such criminal acts as an aggravating circumstance in this case, a juror
 must first be satisfied beyond a reasonable doubt that the defendant Rudolph Jose Roybal

1 did in fact commit such criminal act or acts. *A juror may not consider any evidence of*
 2 *any other criminal acts as an aggravating circumstance.*”¹⁰ (RT 6354) (emphasis
 3 added.)

4 The trial court also directed the jurors that: “Neither the defendant’s juvenile
 5 criminal history nor any violation of probation incurred by him may be considered or
 6 treated by you as a circumstance in aggravation. Evidence received in the guilt or
 7 innocence phase relating to the defendant’s drug use or possession or related activities
 8 . . . as well as what may have been produced in the penalty phase or any other uncharged
 9 crime or crimes is or are not an aggravating factor and cannot be considered by you for
 10 any purpose in aggravation.” (RT 6350-51.) The jurors were specifically admonished
 11 that they were not allowed to consider those prior activities in aggravation. The trial
 12 judge again reiterated which evidence the jury was allowed to consider in aggravation,
 13 as follows:

14 You’ll remember that I read to you alleged act or acts that were
 15 allegedly committed by the defendant which involved alleged force and
 violence or threats of force and violence, and there were four in number.

16 By my listing those, and I’m not going to reread them, but you’ll
 17 remember what they are and you’ll have a written instruction along this
 18 line, by my listing those, I want you to understand that the Court, the Judge,
 is making absolutely no finding or is giving you no signal as to whether or
 19 not those prior acts have in fact been proven. That’s up to you to
 determine. . . .

20 Now, in that same regard, I’ve indicated to you, I don’t think there’s
 any confusion here, but I hope I don’t cause any confusion, I’ve indicated
 21 to you that certain activity, that is, the prior felony convictions and the prior

22 ¹⁰ At the outset of the penalty phase, the trial judge also gave a similar preliminary
 23 instruction to the jury concerning the structure of that proceeding, including the
 following comment:

24 Now, I expect that evidence will be introduced for the purpose of
 25 showing that the defendant, Mr. Roybal, has committed certain alleged
 criminal acts which involve the implied use of force or violence or the
 26 threat of force or violence.

27 Before a juror may consider any of such criminal acts as an
 aggravating circumstance in this case, a juror must first be satisfied beyond
 28 a reasonable doubt that the defendant did in fact commit such criminal acts.
 A juror may not consider any evidence of any other criminal acts as an
 aggravating circumstance.
 (RT 5306-07.)

1 acts involving threats of violence or violence, must be proved beyond a
2 reasonable doubt.

3 (RT 6381-82.)

4 Petitioner fails to show that there is any reasonable likelihood that the jury
5 misapplied the instructions and interpreted it to allow the consideration of nonstatutory
6 evidence in aggravation, much less that any error had a “substantial and injurious effect
7 or influence in determining the jury’s verdict.” Brecht, 507 U.S. at 637. Here, the trial
8 court’s instructions were clear, correct and specifically disallowed the consideration of
9 prior crimes aside from the six prior felony convictions and the four prior acts outlined.
10 The California Supreme Court’s rejection of this claim was neither contrary to, nor an
11 unreasonable application of, clearly established federal law, nor was it based upon an
12 unreasonable determination of the facts. Petitioner does not warrant habeas relief on
13 Claim 15.

14 **5. Claim 16**

15 Petitioner argues that the trial court erred when it modified California Penal Code
16 § 190.3(d) to include specific reference to Petitioner’s background, and asserts that “the
17 effect of the modification was to remove consideration of evidence of ‘fetal alcohol
18 syndrome, prolonged drug and alcohol abuse and dependence, and personality disorders’
19 from factor (k) and put that evidence in factor (d), limiting consideration of mental or
20 emotional disturbance as a factor in mitigation only where it was ‘extreme.’” (FAP at
21 310.) He also asserts that trial counsel’s request for a pinpoint instruction on this matter
22 constituted ineffective assistance of counsel. (Id. at 313-16.)

23 During a discussion on penalty phase jury instructions, defense counsel requested
24 additional language added to California Penal Code § 190.3(d), to allow the jury to
25 consider the evidence of fetal alcohol syndrome, drug and alcohol use and dependence,
26 and personality disorders under that factor. (RT 5883.) The trial court initially stated
27 that: “I’m inclined to give that, because I think that’s helpful to the jury for them to
28 understand that those diagnoses or those conditions qualify generally as mental or
emotional disturbance.” (RT 5886.) After reading the standard section 190.3

1 instructions, including factor (d) instructing that the jury could consider “(d), whether
 2 or not the offense was committed while the defendant was under the influence of extreme
 3 mental or emotional disturbance or disturbances,” and factor (k), instructing that the
 4 jurors could consider “(k), any other circumstance which extenuates the gravity of the
 5 crime, even though it is not a legal cause - - excuse me - - even though it is not a legal
 6 excuse for the crime, and any sympathetic or other aspect of the defendant’s character
 7 or record that the defendant offers as a basis for a sentence less than death, whether or
 8 not related to the offense for which he is on trial,” the trial court additionally instructed
 9 that: “I’ve used the phrase ‘mental or emotional disturbance.’ The phrase ‘mental or
 10 emotional disturbance’ includes fetal alcohol syndrome, prolonged drug and alcohol
 11 abuse and dependence, and personality disorders.” (RT 6348-49.)

12 On direct appeal, the California Supreme Court rejected this claim in a reasoned
 13 decision, stating:

14 Defendant contends the superior court erred: by so defining “mental
 15 or emotional disturbance,” it led the jurors to understand that they could
 16 consider defendant’s specific mental or emotional disorders in mitigation
 only if “extreme.” The point is lacking in merit.

17 As defendant acknowledges, we have repeatedly rejected challenges
 18 to the use of the word “extreme” in Penal Code section 190.3, sentencing
 19 factor (d). (See, e.g., *People v. Ray*, *supra*, 13 Cal.4th 313, 359; *People v.*
 20 *Ghent* (1987) 43 Cal.3d 739, 776 [239 Cal.Rptr. 82, 739 P.2d 1250].) As we
 21 explained in *Ghent*, the statutory sentencing factor permitting consideration
 by the penalty jury of “any other circumstance which extenuates the
 gravity of the crime” is “sufficient to permit the penalty jury to take into
 account a mental condition of the defendant which, though perhaps not
 deemed ‘extreme’ nonetheless mitigates the seriousness of the offense.”
 (*People v. Ghent*, *supra*, 43 Cal.3d at p. 776, italics in original.)

22 Defendant argues that because of the additional reference to the
 23 specific forms of defendant’s particular mental and personality disorder,
 24 jurors would have understood that Penal Code section 190.3, penalty factor
 25 (k) refers only to mental evidence that is extreme. He is unpersuasive. The
 26 superior court instructed the jurors that they could consider, under penalty
 factor (k), “anything about the defendant, his background, his upbringing,
 any sympathetic factor” They would have understood from the
 instruction that they could consider in mitigation any evidence of
 defendant’s fetal alcohol syndrome, alcohol and drug abuse, and personality
 disorders, even if not “extreme.”^{FN15}

27
 28 FN15 Defendant asserts that the error violated his rights under
 the Fifth, Sixth, Eighth and Fourteenth Amendments to the

1 United States Constitution and article I, sections 15, 16, and
 2 17 of the California Constitution. For the reasons stated, there
 3 was no error. In the absence of error, the claim of ineffective
 4 assistance of counsel also fails.

5 Roybal, 19 Cal. 4th at 522-24.

6 As previously noted, in reviewing a claim of this type of instructional error, the
 7 Court must determine “whether there is a reasonable likelihood that the jury has applied
 8 the challenged instruction in a way that prevents the consideration of constitutionally
 9 relevant evidence.” Boyde, 494 U.S. at 380. While Petitioner contends that this
 10 instruction prevented the jurors from considering evidence of fetal alcohol syndrome,
 11 drug and alcohol use and dependence or personality disorders unless it was proven to
 12 have been “extreme,” it is clear that the jurors were instructed at the same time that they
 13 could consider under factor (k) “any other circumstance which extenuates the gravity of
 14 the crime, even though it is not a legal cause - - excuse me - - even though it is not a
 15 legal excuse for the crime, and *any sympathetic or other aspect of the defendant’s*
 16 *character or record that the defendant offers as a basis for a sentence less than death,*
 17 *whether or not related to the offense for which he is on trial.”* (RT 6348-49) (emphasis
 18 added.) Earlier, at the outset of the penalty phase proceedings, the judge explicitly
 19 provided the jurors with the factor (k) instruction, additionally advising that it was “sort
 20 of a catchall area.” (RT 5305-06.)

21 The Court remains unpersuaded that the additional factor (d) instructions restricted
 22 the consideration of mitigation, or that it moved the cited evidence from factor (k) into
 23 factor (d), particularly in light of the trial court’s specific directions to the jurors given
 24 in response to their deadlock, which made it clear that the jurors could consider
 25 mitigating evidence under more than one factor. See Roybal, 19 Cal. 4th at 523; (see
 26 also RT 6654-55.) At that time, the judge discussed factors (h) and (k) and listed several
 27 examples of relevant evidence, again specifically citing to Petitioner’s alcohol use and
 28 abuse and mental condition, as follows:

(h), this has to do with the capacity of the defendant to appreciate the
 criminality of his conduct, et cetera, at the time of the offense. The full

1 language is there for you.

2 There is evidence and it was argued that the defendant may or may
 3 not have been able to appreciate what was going on. Perhaps because he
 4 was impaired as a result of either mental disease or the affects [sic] of
 5 intoxication. You've heard evidence on this matter. I guess this also comes
 down to the (k) factor as well, but it's up to you to determine what weight
 you're going to give this. You have to first determine whether or not there
 was intoxication or mental disease at the time of the offense.

6 If you were to determine that there was not, of course, that wouldn't
 7 enter into, or that wouldn't be given any weight. If you determine that he
 8 did suffer a mental disease or defect or was under the affects [sic] of
 intoxication, you might give that some weight. It depends upon your own
 estimate of what weight you should give it.
 9 (RT 6655-56.) The trial court immediately followed that instructions by again
 10 specifically directing the jurors that they could consider "anything" about Petitioner in
 11 mitigation under California Penal Code section 190.3(k), stating that: "The (k) factor, the
 12 last factor, which might be called the mitigating circumstance factor, although all of
 13 these other matters may have mitigating parts to them, the (k) factor, I'll just call that the
 14 mitigating factor, it's just an easy handle, *entitles you to consider anything about the*
 15 *defendant, his background, his upbringing, any sympathetic factor and so forth.*" (RT
 16 6655-57) (emphasis added.)

17 In light of the trial record and jury instructions as a whole, the Court remains
 18 unpersuaded that the trial court's additional instruction that the jurors could consider
 19 fetal alcohol syndrome, drug and alcohol abuse and personality disorders as part of the
 20 "extreme mental and emotional disturbances" defined in factor (d), did not restrict their
 21 consideration to that factor alone. See McGuire, 502 U.S. at 72 (a challenged instruction
 22 "must be considered in the context of the instructions as a whole and the trial record.")
 23 Given the plain meaning of the factor (k) instruction, which directed the jury to consider
 24 "anything" about Petitioner in mitigation, specifically including "any sympathetic or
 25 other aspect of the defendant's character or record that the defendant offers as a basis for
 26 a sentence less than death, whether or not related to the offense for which he is on trial,"
 27 Petitioner has not shown any reasonable likelihood that the additional instructions
 28 prevented the jury from considering the evidence offered in mitigation. Petitioner also
 fails to show that any alleged error had a "substantial and injurious effect or influence

1 in determining the jury's verdict." Brecht, 507 U.S. at 637.

2 Because the Court finds no error in the contested jury instruction, it follows that
3 Petitioner fails to demonstrate that counsel acted deficiently in requesting modification
4 of the factor (d) instruction, much less that they amounted to error "so serious as to
5 deprive the defendant of a fair trial, a trial whose result is reliable." Strickland v.
6 Washington, 466 U.S. 668, 687 (1984). As such, Petitioner has not shown that the
7 California Supreme Court's rejection of this claim was an objectively unreasonable
8 application of Strickland. See Richter, 562 U.S. at 101 ("The pivotal question is whether
9 the state court's application of the Strickland standard was unreasonable.")

10 The California Supreme Court's rejection of this claim on appeal was neither
11 contrary to nor an unreasonable application of, clearly established federal law, nor was
12 it based upon an unreasonable determination of the facts. Petitioner is not entitled to
13 habeas relief on Claim 16.

14 **6. Claim 17**

15 Petitioner alleges that the trial court erred in refusing to instruct the jurors on the
16 meaning of a sentence to life without the possibility of parole ["LWOP"], violating his
17 rights to due process and a reliable penalty determination under the Fifth, Eighth, and
18 Fourteenth Amendments to the United States Constitution. (FAP at 316.)

19 The state supreme court considered this claim on direct appeal, rejecting it in a
20 reasoned decision as follows:

21 Defendant requested the following instruction: "Life in prison
22 without possibility of parole means the defendant will [not ever] have a
23 parole hearing. He will never be released on parole. Therefore, you must
24 assume in determining penalty in this case defendant will not be released
25 from prison ever." The superior court refused to give the instruction, citing
26 our decision in *People v. Ashmus* (1991) 54 Cal.3d 932 [2 Cal.Rptr.2d 112,
27 820 P.2d 214] to the effect that such an instruction is ambiguous and
28 misleading.

29 Defendant asserts that the court erred. He argues that the instruction
30 only requires the jurors to "assume" that he would not be released from
31 prison; it does not falsely state that he will never, in fact, be released. The
32 claim is lacking in merit.

33 In *Ashmus*, the superior court refused to instruct the jury as follows:
34 "A sentence of life without the possibility of parole means that the

1 defendant will remain in state prison for the rest of his life and will not be
 2 paroled at any time.” (54 Cal.3d at p. 994.) We held that the superior court
 3 did not err. “A court may not give an instruction that is incorrect. [Citation.]
 4 And it is incorrect to declare that the sentence of life imprisonment without
 possibility of parole will inexorably be carried out. [Citation.] The
 instruction here would effectively have made just such a declaration.”
 (*Ibid.*)

5 Like the instruction in *Ashmus*, the proposed instruction was
 6 incorrect to the extent it suggested that someone who is never given a
 7 parole hearing or released on parole will, therefore, never be pardoned or
 8 have his sentence commuted. Use of the word “assume” does not cure the
 problem with the instruction. Like the instruction in *Ashmus*, it could
 reasonably be understood to have “stated all but expressly that the penalty
 would inexorably be carried out.” (*People v. Ashmus*, *supra*, 54 Cal.3d at
 p. 994.)^{FN16}

9
 10 FN16 Defendant also suggests that the instruction was proper
 because a juror might reasonably have understood the
 11 admonition to “assume” that the sentence would be carried out
 to imply that it might, in fact, not be carried out. If so, the
 12 instruction would be incorrect for the same reason that it is
 error to instruct a jury about the Governor’s powers of
 13 reprieve, pardon, and commutation. (*People v. Warren* (1988)
 45 Cal.3d 471, 489 [247 Cal.Rptr. 172, 754 P.2d 218]
 14 [so-called Briggs Instruction concerning the Governor’s
 powers unconstitutionally invites the jury to be influenced by
 15 speculative and improper considerations.].) Defendant asserts
 that the instructional error also violated his rights under the
 16 Fifth, Eighth, and Fourteenth Amendments to the United
 States Constitution. The claims are unavailing; the provisions
 17 are not implicated.

18 Roybal, 19 Cal. 4th at 524-25 (alterations in original).

19 A review of the record reflects that Petitioner’s jury was instructed, both at the
 20 outset of the penalty phase proceedings and again prior to closing arguments, that the
 21 two potential penalties were “death or confinement in the state prison for life without
 22 possibility of parole.” (RT 5300, 6336.) After closing arguments, the trial judge again
 23 directed the jurors that “it will now be your duty to determine which of the two penalties,
 24 death on the one hand or on the other confinement in the state prison for life without
 25 possibility of parole, shall be imposed on the defendant.” (RT 6550.)

26 Petitioner contends the jury should also have been instructed on the meaning of
 27 life without the possibility of parole, specifically, that it meant Petitioner would never
 28 leave prison. (FAP at 317.) He argues that while the trial court and state supreme court

1 decisions were based on Ashmus, several United States Supreme Court decisions, one
2 of which was issued prior to the California's Supreme Court's direct appeal opinion,
3 have "viewed the matter differently" and that the state supreme court's rejection of this
4 claim was contrary to clearly established federal law. (FAP at 318-19, citing Simmons
5 v. South Carolina, 512 U.S. 154 (1994) and Shafer v. South Carolina, 532 U.S. 36
6 (2001).)

7 Shafer and Simmons are both distinguishable from the situation presented here,
8 as California capital procedures have significant and pertinent differences from the
9 procedures employed in South Carolina. While Petitioner contends that the jurors should
10 have been informed about the meaning of life without the possibility of parole, Petitioner
11 fails to cite to clearly established law requiring the requested instruction and has not
12 shown that the trial court's failure to give this instruction amounted to error of a
13 constitutional dimension. See Villafuerte v. Stewart, 111 F.3d 616, 624 (9th Cir. 1997)
14 ("'[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a
15 misstatement of the law' and, thus, a habeas petitioner whose claim involves a failure to
16 give a particular instruction bears an 'especially heavy burden.'"), quoting Henderson
17 v. Kibbe, 431 U.S. 145, 155 (1977).

18 In Simmons, the jurors were simply told that life imprisonment was a sentencing
19 option, without any further instruction clarifying the definition of the term or offering
20 information that the defendant would not be eligible for parole. Id., 512 U.S. at 158.
21 During the penalty proceedings, the prosecutor introduced evidence of the defendant's
22 future dangerousness, and the trial court instructed that the jurors were not to consider
23 parole, which allowed the implication that parole was a possibility. Id. at 170-71. The
24 Supreme Court held that, under those circumstances, the failure to provide an instruction
25 regarding lack of parole eligibility was a violation of due process, reasoning that: "The
26 State may not create a false dilemma by advancing generalized arguments regarding the
27 defendant's future dangerousness while, at the same time, preventing the jury from
28 learning that defendant never will be released on parole." Id., 512 U.S. at 171.

1 Yet, as even the Simmons Court recognized, California's statute differs from
2 South Carolina's in this respect, as California was one of nine states which "simply
3 identify the jury's sentencing alternatives as death and life without parole." Id. at 167
4 n.7. As noted above, Petitioner's jury was specifically instructed that the two possible
5 penalties were "death or confinement in the state prison for life without possibility of
6 parole." (RT 5300, 6336.) As such, the concerns addressed in Simmons are not present
7 in this case, as Petitioner's sentencing jury was well-apprieved that there was no
8 possibility of parole.

9 The Supreme Court's decision in Shafer is similarly distinguishable. In that case,
10 the sentencing jury was told that "life imprisonment means until the death of the
11 defendant," and the trial court refused to instruct the jurors that a life sentence would be
12 without parole. Id., 532 U.S. at 43-45. Even after the jury sent a note asking if the
13 defendant could be eligible for parole and about the circumstances that might allow for
14 such a possibility, the trial judge simply reiterated that life meant until the death of the
15 defendant and stated that "[p]arole eligibility or ineligibility is not for your
16 consideration." Id. at 44-45. The Supreme Court found Simmons applicable to Shafer,
17 and stated that "whenever future dangerousness is at issue in a capital sentencing
18 proceeding under South Carolina's new scheme, due process requires that the jury be
19 informed that a life sentence carries no possibility of parole." Id. at 51. Again, in
20 California, a jury is instructed that their penalty phase decision can either be the death
21 penalty or life in prison without the possibility of parole. Contrary to Shafer, Petitioner's
22 penalty phase jury was properly instructed pursuant to California law that the possible
23 penalties were either "death or confinement in the state prison for life without possibility
24 of parole." (RT 5300, 6336.) Moreover, unlike in Simmons or Shafer, there is no
25 indication that Petitioner's jury was confused about the given instructions. See Shafer,
26 532 U.S. at 44-45; Simmons, 512 U.S. at 177-78 (O'Connor, J., concurring). Petitioner
27 fails to demonstrate that the concerns addressed by the Supreme Court in Simmons and
28 Shafer govern Petitioner's situation.

Petitioner points out that the California Supreme Court's opinion recognized the possibility that defendant could be released and asserts that: "The hyper-technical approach taken by the California Supreme Court in this case that a jury should not be told that they should assume a person sentenced to life without parole will never be released from prison because that was not a correct statement of the law cannot be reconciled with the jury's need to know the near impossibility Mr. Roybal would not die in prison." (FAP at 320.) Again, Petitioner's jury was instructed that life in prison meant "without the possibility of parole," and he fails to satisfy the "especially heavy burden" of demonstrating that the trial court's failure to define LWOP was prejudicial. See Villafuerte, 111 F.3d at 624, quoting Kibbe, 431 U.S. at 155. Given that Petitioner has not demonstrated any likelihood that the jury was confused about the provided instructions, the trial court was clearly within its discretion in denying the proposed instruction. In any event, even if Petitioner were able to demonstrate that the failure to give this instruction constituted error, he has not shown that the alleged error had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 637. The California Supreme Court's rejection of this claim on appeal was neither contrary to, nor an unreasonable application of, clearly established federal law, nor was it based upon an unreasonable determination of the facts. Petitioner does not merit habeas relief on Claim 17.

7. Claim 18

Petitioner contends that "[u]nder California law, a jury has the discretion to impose a sentence of life without parole even if evidence is presented in aggravation and there is no evidence presented in mitigation," and the trial court's failure to instruct the jurors accordingly violated Petitioner's constitutional rights to due process and a reliable penalty determination. (FAP at 321-22.)

On direct appeal, the California Supreme Court considered and rejected this claim, reasoning:

The superior court gave the standard instructions concerning

1 selection of the appropriate punishment, admonishing the jury, inter alia, as
 2 follows: "In weighing the various circumstances, you determine under the
 3 relevant evidence which penalty is justified and appropriate by considering
 4 the totality of the aggravating circumstances with the totality of the
 5 mitigating circumstances. [¶] To return a judgment of death, each of you
 6 must be persuaded that the aggravating circumstances are so substantial in
 7 comparison with the mitigating circumstances that it [*sic*] warrants death
 8 instead of life without parole."

9 Defendant asserts that the superior court erred in failing also to
 10 inform the jurors that they had discretion to refuse to impose the death
 11 penalty even if they found that there was no evidence in mitigation. He
 12 insists that lack of such instruction violated his rights under the Fifth,
 13 Eighth, and Fourteenth Amendments to the United States Constitution. The
 14 claim fails. No such instruction was required.

15 We rejected the same point in *People v. Ray*, *supra*, 13 Cal.4th at
 16 page 355. As in *Ray*, "the standard instructions given in this case
 17 adequately guide selection of the appropriate punishment, including the
 18 jury's discretion to reject a death sentence under the circumstances
 19 highlighted by defendant. Specifically [the jury was informed] that in order
 20 '[t]o return a judgment of death, each of you must be persuaded that the
 21 aggravating [evidence is] so substantial in comparison with the mitigating
 22 circumstances that it warrants death instead of life without parole.' By
 23 stating that death *can* be imposed only in one circumstance-where
 24 aggravation substantially outweighs mitigation-the instruction clearly
 25 implies that a sentence less than death *may* be imposed in all other
 26 circumstances." (*Id.* at pp. 355-356, italics in original.)

27 We therefore conclude, as before, that the superior court's
 28 instructions concerning its sentencing discretion adequately advised the
 jury of its sentencing responsibilities. "No reasonable juror would assume
 he or she was required to impose death despite insubstantial aggravating
 circumstances, merely because no mitigating circumstances were found to
 exist." (*People v. Ray*, *supra*, 13 Cal.4th at p. 356.)

19 Roybal, 19 Cal. 4th at 525-26 (alterations in original).

20 Petitioner argues that the trial court erred in failing to inform the jury that it had
 21 the discretion to impose a sentence of life in prison without the possibility of parole even
 22 if they found evidence in aggravation and no evidence in mitigation. (FAP at 322.) As
 23 discussed in Claim 14, the trial court repeated and emphasized that the jury must engage
 24 in a weighing process, considering both the evidence in mitigation and that in
 25 aggravation to determine the appropriate penalty. The trial judge also correctly
 26 instructed the jurors that they could only impose a death sentence under very specific
 27 conditions, that is, if they found that "the aggravating circumstances were so substantial
 28 in comparison with the mitigating circumstances that it warrants death instead of life

1 without parole.” (CT 2051; see RT 5308, 6551.) The jury instructions clearly limited
2 the option of a death sentence to those cases where the aggravating evidence was “so
3 substantial” in comparison to that in mitigation, which left the jury free to impose a
4 sentence of life without the possibility of parole under all other circumstances, including
5 those in which the aggravating evidence simply outweighed the evidence in mitigation,
6 or a situation in which the jurors found some evidence in aggravation but no evidence
7 in mitigation.

8 In any event, Petitioner fails to show that such an instruction was constitutionally
9 required, nor does he satisfy the “especially heavy burden” of demonstrating that the
10 absence of the instruction amounted to error of constitutional dimension. See
11 Villafuerte, 111 F.3d at 624, quoting Kibbe, 431 U.S. at 155. Respondent reasonably
12 adds that it was “unlikely” the jury would find an absence of mitigation in this case,
13 noting that “the defense introduced substantial evidence in mitigation.” (Ans. at 98.)
14 Indeed, the defense presented evidence about Petitioner’s impoverished upbringing,
15 replete with abuse and neglect, as well as his early alcohol and drug use and abuse, and
16 his mental and emotional impairments. In imposing sentence, the trial judge stated that
17 “there was lots of evidence that was presented under the (k) factor” in particular, and
18 considered mitigation under factors (d), (h), as well as (k) in determining that the
19 evidence in aggravation substantially outweighed that in mitigation. (RT 6761, 6765.)
20 In light of the acknowledged evidence in mitigation, even were the Court to find that the
21 trial court’s failure to provide this instruction was in error, Petitioner fails to demonstrate
22 that the absence of this instruction had a “substantial and injurious effect or influence in
23 determining the jury’s verdict.” Brecht, 507 U.S. at 637. The California Supreme Court
24 reasonably concluded that the requested instruction was not required and that the trial
25 court’s instructions “adequately advised the jury of its sentencing responsibilities.”
26 Roybal, 19 Cal. 4th at 526. This adjudication was neither contrary to, nor an
27 unreasonable application of, clearly established federal law, nor was it based upon an
28 unreasonable determination of the facts. Petitioner is not entitled to habeas relief on

1 Claim 18.

2 **8. Claim 19**

3 Petitioner alleges that the trial court erred in refusing to instruct the jurors that his
4 prior crimes and convictions could also be considered in mitigation, because his prior
5 felonies were “not serious” but instead were “a series of petty thefts that, because of their
6 frequency, became felony convictions,” that the “evidence of petty thievery could also
7 be considered as a product of Mr. Roybal’s poverty,” and that these “acts of violence”
8 appear quite *de minimus* when compared to the usual evidence introduced by the
9 prosecution as evidence in aggravation in capital cases.” (FAP at 326-27.)

10 On direct appeal, the state supreme court rejected this claim in a reasoned opinion
11 as follows:

12 Defendant requested instructions to the effect that evidence of prior
13 felonies and prior violent criminal acts could be considered as
14 circumstances in mitigation. Defense counsel argued: “We think the jury
15 ought to be able to consider those crimes as a manifestation, a reflection of
16 the poverty and deprivation of Rudolph Roybal’s childhood, and in that
17 sense, can treat them as mitigation, not aggravation. It can also consider the
18 nature of the crimes, property crimes, and consider that as mitigation”
19 “We think the jury can consider these prior so-called acts of violence as
20 circumstances in mitigation, and again, we object that the jury being told,
21 if not entirely explicitly, these are circumstances that can serve only to
22 aggravate.” The superior court denied the request on the ground that such
23 instruction would be confusing.

24 Instead, the superior court instructed the jurors, inter alia, that they
25 could consider, under Penal Code section 190.3, penalty factor (k), “any
26 sympathetic or other aspect of the defendant’s character or record that the
27 defendant offers as a basis for a sentence less than death, whether or not
28 related to the offense for which he is on trial.” It also instructed the jurors
that they could consider “anything about the defendant, his background, his
upbringing, any sympathetic factor and so forth.” In addition, it instructed
that they could consider whether “at the time of the offense the capacity of
the defendant to appreciate the criminality of his conduct or to conform his
conduct to the requirement of law was impaired as a result of mental
disease or defect or the effects of intoxication.” After the jurors indicated
that they might be deadlocked, the court stated: “. . . I think the attorneys,
for example, one side, argued well, these are not-there were no weapons
used in any of these offenses, they were done during a time when allegedly
the defendant was inebriated or under the influence or something like that;
well, that’s a factor you can consider.”

Defendant contends that the superior court erred in refusing his
requested instruction, thereby violating his rights under the Fifth, Sixth,
Eighth, and Fourteenth Amendments to the United States Constitution and
article I, sections 7, 15, 16, and 17 of the California Constitution.

Specifically, he argues that by referring to “any sympathetic or other aspect of the defendant’s character or record that the defendant offers as a basis for a sentence less than death,” the superior court implied that the jurors could consider in mitigation only sympathetic evidence he offered, but could not regard any of the evidence the prosecution presented. He is unpersuasive. There is no reasonable likelihood that the superior court’s instructions, considered as a whole, would have led a reasonable juror to believe he or she could not consider, in mitigation, *any* relevant evidence, including the fact that some of defendant’s prior felonies were not violent, and that some of his prior violent criminal acts might have been committed under the influence of substance abuse or a mental disorder.

Roybal, 19 Cal. 4th at 527-28.

The Supreme Court has clearly held that “the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (footnote omitted); see also Eddings v. Oklahoma, 455 U.S. 104, 110 (1982). Petitioner contends that the trial court’s refusal to specifically instruct the jurors that his prior crimes and convictions could also be considered in mitigation violated his constitutional rights by precluding the jury from considering relevant evidence in mitigation. (FAP at 326.) Petitioner asserts that the evidence surrounding these crimes, particularly evidence of his drug and alcohol abuse, could have been considered as mitigation, yet the jury “was instructed that this was evidence that could be used only in aggravating evidence to support a verdict of death.” (FAP at 328.)

As an initial matter, a review of the record does not support Petitioner’s contention that the jurors were instructed that factors (b) and (c) could “only” be considered in aggravation. The jurors were specifically directed that those prior crimes and convictions may be considered in aggravation only if jurors were satisfied that the offenses were proven beyond a reasonable doubt. (See RT 6352, 6354.) Petitioner contends that the trial court’s listing of the prior crimes and convictions, followed by the instruction that “[y]ou may consider such crimes as aggravating evidence in this case” limited the jury’s consideration of that evidence. (RT 6352.) The Court remains

1 unpersuaded that this instruction could have reasonably precluded the consideration of
2 that evidence in mitigation. Indeed, the plain language of the instructions simply
3 directed the jurors that “You shall consider, take into account, and be guided by the
4 following factors” (RT 6347; see also RT 5303-04).

5 The trial court reasonably rejected the defense’s proposed instruction, stating in
6 part that: “[t]he (k) factor covers this, because as extenuating or mitigating
7 circumstances, the jury is entitled to consider any other aspect of the defendant’s record,
8 so it’s already covered as a mitigating factor, although under a different section, and the
9 request that I somehow modify or pinpoint this is respectfully denied as covered. You
10 can certainly argue it.” (RT 5901.) After defense counsel contended that the instruction
11 implied that the prior crimes mentioned in (b) and (c) could only be used in aggravation,
12 the trial court again declined to modify the section 190.3 instructions because “the (k)
13 factor does use the defendant’s record, which would include these acts, as extenuating
14 circumstances. The defense may argue it. I choose not to try to alter the 190.3 language.
15 The request is respectfully denied.” (RT 5904.) Upon review of the jury instructions,
16 it is clear that factor (k) allowed this evidence to be considered in mitigation. The trial
17 judge instructed that: “(k), any other circumstance which extenuates the gravity of the
18 crime, even though it is not a legal cause - - excuse me - - even though it is not a legal
19 excuse for the crime, and any sympathetic or other aspect of the defendant’s character
20 or record that the defendant offers as a basis for a sentence less than death, whether or
21 not related to the offense for which he is on trial.” (RT 6348-49.)

22 In closing, defense counsel also argued at length that the prior crimes and
23 convictions should be considered in mitigation rather than in aggravation. The defense
24 argued that Petitioner’s criminal activity was connected to his history of drug and alcohol
25 abuse, noting that one conviction resulted in Petitioner being sent to a state hospital for
26 alcoholism, characterized another crime as a “falling-out among drug addicts” that he got
27 involved in, and pointed out that Petitioner wielded spray paint during that crime, which
28 he had also used as a drug. (RT 6487.) The defense also asserted that several other

1 incidents, such as an encounter with police at his mother's house, occurred when he was
2 in a "drunken stupor," and asserted that "in each incident you see evidence of alcohol
3 or drug abuse going on." (RT 6487-88.) Counsel then contended that: "I submit that
4 you can consider those four incidents not as aggravation, but in comparison to the
5 histories of violent criminals that perhaps this is actually mitigation, that this kind of
6 history, four incidents in almost two decades, is not what you would expect to see of a
7 truly violent, evil person." (RT 6488.)

8 The defense also argued that a judge who had previously sentenced Petitioner
9 recognized that the criminal activity reflected his problems with substance abuse:

10 By his actions, I think we can understand that the judge saw here
11 what the prosecutor saw, Mr. Blackmer, and that was a man who, if we
12 house him for whatever number of years in prison, he will just come out
13 and continue, because he has a problem. He has a problem that needs to be
14 treated. And unless that problem is treated, he will continue. [¶] And in
15 order to protect society, not just today, but tomorrow and tomorrow, we
16 need to get this man in a long-term live-in treatment program, with the
threat of prison over his life. That's what the judge did. Because he saw
there was an underlying problem, not just an evil person, but someone who
needed serious, serious, help. [¶] So I ask you to look at the prior
convictions and the prior so-called violent acts. Put them in the context of
what this case is about, special circumstance murder. Is this what we're
talking about in terms of a history. Is this aggravating?

17 (RT 6490-91.) Petitioner cites Cal. Penal Code § 190.3 (k), which states that the jurors
18 can consider in mitigation any evidence "that the defendant offers," and asserts that the
19 jurors would have understood the factor (k) instruction to apply only to evidence offered
20 by the defense, not the prosecution. However, again, the plain language of factor (k)
21 states that the jury could consider "any sympathetic or other aspect of the defendant's
22 character or record that the defendant offers as a basis for a sentence less than death."
23 See Cal. Penal Code § 190.3(k). Here, the defense clearly contended the prior crimes
24 and convictions could be considered in mitigation and, as such, offered that aspect of
25 Petitioner's record in support of an argument that Petitioner should not be sentenced to
26 death.

27 The trial court did not err in rejecting the proposed instruction, as the trial court
28 reasonably noted that the factor (k) instruction allowed the jury to consider any evidence,

1 including the prior crimes, in mitigation. The trial court reasoned that defense counsel
2 could argue the extenuating circumstances of those crimes, and the record reflects that
3 defense counsel made that argument before the jury. Considering the record as a whole,
4 Petitioner fails to demonstrate that the jurors were “precluded from considering, as a
5 mitigating factor, any aspect of a defendant’s character or record and any of the
6 circumstances of the offense that the defendant proffers as a basis for a sentence less than
7 death.” Lockett, 438 U.S. at 604.

8 Even if the Court were to find that the failure to provide the requested instruction
9 amounted to error of a constitutional dimension, because the factor (k) instruction
10 specifically allowed the jury to consider “any sympathetic or other aspect of the
11 defendant’s character or record” in mitigation, accompanied by defense counsel’s
12 argument that the prior crimes should be considered in mitigation, Petitioner has not
13 shown that the absence of this instruction had a “substantial and injurious effect or
14 influence in determining the jury’s verdict.” Brecht, 507 U.S. at 637. The California
15 Supreme Court’s rejection of this claim on appeal was neither contrary to, nor an
16 unreasonable application of, clearly established federal law, nor was it based upon an
17 unreasonable determination of the facts. Petitioner is not entitled to habeas relief on
18 Claim 19.

19 **9. Claim 20**

20 Petitioner alleges that the trial court erred in preventing the defense from
21 comparing the facts of his case with that of other notorious homicide cases and that the
22 “trial court’s instruction prohibiting the jurors from comparing circumstances of Mr.
23 Roybal’s case with those of other homicides eviscerated the constitutional premise
24 underlying the application of the death penalty.” (FAP at 332-34.)

25 The California Supreme Court rejected this claim on direct appeal in a reasoned
26 opinion:

27 In closing argument, defense counsel sought to compare defendant’s
28 crime to the facts of other well-known murders-particularly the so-called
“Billionaire Boys Club” case in which the defendant did not receive the
death penalty. She argued that defendant’s “organic impairment, emotional

1 impairment, psychological impairment” distinguished him from other
 2 murderers: “Should you count that? Of course you should.” She then
 3 referred to the Billionaire Boys Club, “privileged kids who don’t have a
 4 problem in their background, except maybe they were spoiled, coldly
 5 calculating killing people for money.” The superior court sustained an
 6 objection by the prosecutor and admonished the jurors that they were “not
 7 to consider comparison with any other particular crime.” During a
 8 supplemental charge to the jurors, it repeated the admonition: “[Y]ou may
 9 not attempt to compare this crime, this murder, with any other murder. In
 10 other words, you can’t indulge in comparisons. If you did that, we-the
 11 attorneys would have no idea what you were comparing it with. There’s no
 12 evidence before you as to what other crimes that you’re to compare this
 13 with. . . . You focus on the facts associated with this case, with this
 14 defendant, with this crime.”

15 Defendant claims error, in violation of his rights under the Fifth,
 16 Sixth, Eighth, and Fourteenth Amendments to the United States
 17 Constitution. He argues that a juror may not be precluded from comparing
 18 the circumstances of the crime to the facts of other cases and that defense
 19 counsel should have been permitted to argue that they should do so. No
 20 error appears.

21 The superior court’s ruling fell within its discretion to control the
 22 scope of closing argument. (*People v. Sanders* (1995) 11 Cal.4th 475, 555
 23 [46 Cal.Rptr.2d 751, 905 P.2d 420] [“The trial court did not err in
 24 excluding references to the notorious but unrelated crimes of Charles
 25 Manson or to the penalty of life imprisonment that he ultimately
 26 received.”].) As we explained in our discussion in point in *People v.*
 27 *Marshall* (1996) 13 Cal.4th 799, 855 [55 Cal.Rptr.2d 347, 919 P.2d 1280],
 28 meaningful comparisons with other well-publicized crimes cannot be made
 solely on the basis of the circumstances of the crime or the social status of
 the perpetrator, without consideration of the other aggravating and
 mitigating circumstances. Yet the superior court could properly conclude
 that allowing counsel to argue all such circumstances would be too
 time-consuming and direct the jury’s focus away from the matter at issue.
 Defendant was not precluded from arguing his central point: that the
 circumstances of the crime were mitigated by his background and his
 mental and emotional disorders.

21 The trial court’s instruction to the jurors that they “may not attempt
 22 to compare this crime, this murder, with any other murder,” also did not
 23 constitute prejudicial error. “The focus in a penalty phase trial of a capital
 24 case is on the character and record of the individual offender.” (*People v.*
 25 *Johnson* (1989) 47 Cal.3d 1194, 1249 [255 Cal.Rptr. 569, 767 P.2d 1047].)
 26 The sentences received by notorious defendants in other cases, based on
 27 different facts and evidence not before the jurors, is of dubious relevance.
 28 The jurors were not instructed that they should not consider the defendant’s
 central point, i.e., that his crime was mitigated by his personal background.

26 Roybal, 19 Cal. 4th at 528-29 (alterations in original).

27 “There can be no doubt that closing argument for the defense is a basic element
 28 of the adversary factfinding process in a criminal trial.” Herring v. New York, 422 U.S.

1 853, 858 (1975). However, “[t]he presiding judge must be and is given great latitude in
2 controlling the duration and limiting the scope of closing summations.” Id. at 862. As
3 noted previously, even if Petitioner is able to demonstrate that the trial court’s ruling
4 amounted to constitutional error, habeas relief is unavailable unless that error had a
5 “substantial and injurious effect or influence in determining the jury’s verdict.” Brecht,
6 507 U.S. at 637.

7 First, Petitioner argues that the trial judge’s ruling deprived him of a reliable
8 penalty determination, and that the restrictions on the scope of his closing argument
9 eliminated potential comparative review, which would have provided additional
10 insulation against the possibility of arbitrary sentencing. (FAP at 335.) As discussed
11 with respect to Claim 38 below, comparative proportionality review is not
12 constitutionally required. What is required is the “individualized consideration” of the
13 factors offered by a defendant in mitigation. See Lockett, 438 U.S. at 606; see also
14 Eddings, 455 U.S. at 100; see also Zant v. Stephens, 462 U.S. 862, 879 (1983) (“What
15 is important at the selection stage is an *individualized* determination on the basis of the
16 character of the individual and the circumstances of the crime.”) Petitioner fails to
17 demonstrate that these limits on closing arguments prevented or proscribed the jury’s
18 individualized decision with respect to Petitioner’s punishment, as the jurors were
19 presented with a substantial amount of evidence about Petitioner’s background and
20 factors to consider with respect to the crime.

21 Petitioner also contends that this argument could have mitigated his crime in the
22 eyes of the jurors and the trial court’s denial deprived him of a relevant factor in
23 mitigation. (FAP at 336.) As discussed earlier, “the Eighth and Fourteenth Amendments
24 require that the sentencer, in all but the rarest kind of capital case, not be precluded from
25 considering, as a mitigating factor, any aspect of a defendant’s character or record and
26 any of the circumstances of the offense that the defendant proffers as a basis for a
27 sentence less than death.” Lockett, 438 U.S. at 604 (1978); see also Eddings, 455 U.S.
28 at 110. But Petitioner fails to persuasively explain how the facts of an unrelated case,

1 even as compared to that of Petitioner's, is relevant to either an "aspect of defendant's
2 character or record" or as a part of the "circumstances of the offense." Indeed, the
3 Supreme Court has emphasized that "an individualized decision is essential in capital
4 cases." Lockett, 438 U.S. at 605. In closing, trial counsel conceded that all special
5 circumstance murders were "bad," but contended that the factors must be considered in
6 deciding the appropriate punishment, and asserted that in Petitioner's case "[t]here was
7 organic impairment, emotional impairment, psychological impairment." (RT 6544.)
8 Counsel argued that "[a]lmost every one of the mitigating factors apply in this case."
9 (RT 6545.) It is clear that counsel was not precluded from arguing the individual
10 circumstances of Petitioner's case did not warrant a death sentence. Petitioner also
11 contends that the trial court's ruling deprived him of the effective assistance of counsel.
12 (FAP at 337-38.) Yet, because Petitioner fails to demonstrate that this proposed
13 argument was relevant to the jury's penalty determination, the Court finds no merit in
14 this contention.

15 Finally, Petitioner asserts that because the trial prosecutor argued Petitioner's case
16 was "horrible" and "extreme" and that Petitioner was a "rare" killer who deserved the
17 death penalty because he stabbed the victim multiple times and slit her throat, the trial
18 court's ruling barred the defense from relevant rebuttal argument. (FAP at 339-40.)
19 Again, the trial court's ruling did not prevent defense counsel from arguing that
20 Petitioner's crime was mitigated by his background and circumstances. Moreover, a
21 review of the record clearly reflects that the prosecutor did not compare Petitioner's
22 crimes to other unrelated crimes.

23 Accordingly, this claim is without merit because Petitioner fails to demonstrate
24 that the trial court's ruling amounted to error of a constitutional dimension. Even were
25 Petitioner able to demonstrate error, Petitioner fails to show that any such error had a
26 "substantial and injurious effect or influence in determining the jury's verdict." See
27 Brecht, 507 U.S. at 637. The state supreme court's rejection of this claim was neither
28 contrary to, nor an unreasonable application of, clearly established federal law, nor was

1 it based upon an unreasonable determination of the facts. Petitioner is not entitled to
2 habeas relief on Claim 20.

3 **10. Claim 21**

4 Petitioner asserts that the trial court erred in instructing the jurors that they could
5 not consider their own personal views about the death penalty in making their penalty
6 determination, arguing that “there was no legal basis for the trial court’s demand that the
7 jurors ignore their philosophical beliefs about the death penalty in determining whether
8 it was appropriate in this case or, if they could not, to ask to be excused from the jury for
9 violating their oath of service.” (FAP at 341-44.)

10 The California Supreme Court considered this claim on direct appeal, and rejected
11 it in a reasoned decision as follows:

12 After the jurors informed the superior court during deliberations that
13 they appeared to be deadlocked, it gave a supplemental instruction as
14 follows: “All of you took an oath and told us under oath that you would not
15 re-debate the issue of the death penalty. Well, that was a matter that you
16 took care of, if you were interested, in the ballot box but not in the jury
17 setting. [¶] Along the same lines, you cannot consider the religious,
18 philosophical or political background, the differences you may have with
19 regard to whether the death penalty is appropriate or inappropriate. [¶]
20 Why? Once again, you wouldn’t be true to your oath. You’d be misleading
21 the attorneys, the parties here, because they’re expecting, and they’ve had
22 your pledge, that those matters would not enter into your thinking.”

23 Defendant asserts error. He contends that the superior court’s
24 remarks violated his rights under the Fifth, Sixth, Eighth, and Fourteenth
25 Amendments to the United States Constitution. He argues that under those
26 provisions a juror may not be prohibited from considering any
27 conscientious scruples he or she may have about the death penalty in
28 determining the appropriate punishment at the penalty phase. The claim is
lacking in merit. The superior court did not err in reminding jurors of their
oath to render a verdict according only to the evidence presented and the
instructions of the judge, i.e., that they should set aside their moral,
philosophical, or religious reservations about the death penalty in deference
to the rule of law.

24 Roybal, 19 Cal. 4th at 529-30 (alterations in original).

25 Petitioner contends that the trial court erred in instructing the jury, asserting that:

26 It is important to remember that not all who oppose the death penalty are
27 subject to removal for cause in capital cases; those who firmly believe that
28 the death penalty is unjust may nevertheless serve as jurors in capital cases
so long as they state clearly that they are willing to temporarily set aside
their own beliefs in deference to the rule of law. *Lockhart v. McCree*, 476
U.S. 162, 176 (1986).

1
2 (FAP at 343.) Petitioner also argues that, pursuant to the Supreme Court’s decision in
3 Witherspoon, jurors cannot be excluded from a venire simply because of their general
4 views about the death penalty. (FAP at 343); see Witherspoon, 391 U.S. at 521-22.
5 Petitioner asserts that “there was no legal basis for the trial court’s demand that the jurors
6 ignore their philosophical beliefs about the death penalty in determining whether it was
7 appropriate in this case or, if they could not, to ask to be excused from the jury for
8 violating their oath of service.” (FAP at 344.)

9 However, the Supreme Court has also instructed that a juror’s views or opinions
10 may not “prevent or substantially impair the performance of his duties as a juror in
11 accordance with his instructions and his oath.” Witt, 469 U.S. 412, 424 (1985), quoting
12 Adams, 448 U.S. at 45. Additionally, this Court must evaluate Petitioner’s claim of
13 instructional error by reviewing the trial record and instructions as a whole. See
14 McGuire, 502 U.S. at 72; Cupp, 414 U.S. at 147. It is this review, and in particular the
15 instructions given just prior to and after the contested portion, that clearly show the aim
16 of the trial court’s comments was to remind the jurors that their decision must be based
17 on the evidence and the law.

18 In response to the jurors’ statement that they were deadlocked, the trial judge
19 noted that “there may be feelings, sentiments, worries, undeclared expressions of opinion
20 that are entering into the deliberative process,” and asked the jurors to “be very honest”
21 with themselves to determine if they were allowing such factors to influence their
22 deliberations. (RT 6647.) Then, the trial judge instructed that: “The items that you may
23 not consider either overtly or even holding the card in your hand are: whether the death
24 penalty law is good or bad. You can’t re-debate that issue.” (Id.) The trial judge
25 reminded the jurors that during the voir dire proceedings, jurors who “could not set those
26 matters aside” were excused from service. (RT 6647-48.) After the contested
27 instruction, the trial judge offered an additional explanation and clarification:

28 To put it a little bit differently, once again, if I were deciding the

1 case, which I'm not, if I had a personal belief that I did not approve of the
 2 death penalty and I was asked to rule on this, I would have to recuse myself.
 3 I could not in good conscience sit on the case On the other hand, let's
 4 say I had a religious belief, a very strong belief in the biblical saying that
 5 was referred to, an eye for an eye, that type of thing, and I believed that
 6 everybody that killed somebody should always receive the death penalty,
 and that was my mind set. Once again, I would not be an appropriate judge
 to hear the case. I'd have to recuse myself. [¶] So I think - - or let me put
 it a little bit differently. I would have to, in good conscience, be able to set
 aside all of those personal beliefs or feelings in deciding this case. And if
 I couldn't do so, then, of course, then I'd have to opt out.

7 (RT 6648-49.) It is evident that the trial court's supplemental instruction appropriately
 8 cautioned the jurors that their penalty decision must be based on the evidence presented
 9 during the proceedings and the law as provided. The Court finds no error, much less that
 10 the alleged error had a "substantial and injurious effect or influence in determining the
 11 jury's verdict." McGuire, 502 U.S. at 72; Brecht, 507 U.S. at 637. Accordingly, the
 12 state supreme court's rejection of this claim, and declining to find that the instruction
 13 constituted error, was neither contrary to, or an unreasonable application of law, nor did
 14 it involve an unreasonable determination of the facts. Petitioner is not entitled to habeas
 15 relief on Claim 21.

16 **11. Claim 22**

17 Petitioner contends that the trial court erred in instructing the jurors that they could
 18 not place themselves in the shoes of either the victim or the defendant, and argues that
 19 this instruction limited the jury's consideration of evidence in mitigation in violation of
 20 his constitutional rights. (FAP at 346.)

21 On direct appeal, the California Supreme Court rejected this claim in a reasoned
 22 opinion as follows:

23 The superior court instructed: "Another thing you cannot do is place
 24 yourself in the shoes of the victim or of the defendant. Now, let me just-it's
 25 very common sense to me, but maybe I need to explain this. If you were to
 26 place yourself in the shoes of the victim or the shoes of the defendant in
 27 deciding this case, then you might just say, well, wait a second, if someone
 28 killed me, that guy is-deserves the death penalty. [¶] But that is not your
 job. Your job is a weighing process that I'll get to and I've already told you
 about. You can't do that. By the same token, if you place yourself in the
 shoes of the defendant, the death penalty would never, or at least arguably,
 would never, ever be imposed by a jury, because the jurors, or at least one

1 of the twelve would at least say, hey, I wouldn't like to be killed. So that is
2 not a factor that you can put into the equation, so to speak."

3 Defendant claims that the superior court erred. He argues that jurors
4 may not be precluded from viewing mitigating evidence from the
perspective of the defendant in order to determine whether death is the
appropriate punishment.^{FN17}

5 FN17 As defendant correctly points out, we rejected a claim
6 in *People v. Wash, supra*, 6 Cal.4th at pages 263-264, that it
7 was misconduct for the prosecutor to invite the jurors to put
8 themselves in the shoes of the victim. "[W]e have found such
9 an appeal appropriate at the penalty phase because there "the
10 jury decides a question the resolution of which turns not only
11 on the facts, but on the jury's moral assessment of those facts
12 as they reflect on whether defendant should be put to death.""
13 (*Id.* at p. 263.) Understandably, defendant does not assert a
14 claim based on this portion of the superior court's instruction.

15 The claim fails. The superior court did not, as defendant suggests,
16 prevent the jurors from considering mitigating evidence concerning
17 defendant's background and character or even from sympathizing with him.
18 Rather, its instruction directed the jurors not to substitute emotion for
19 rational judgment. It did not err in instructing the jurors, in effect, that that
20 [sic] they should not allow considerations about how they would personally
21 react if they faced a sentence of death to interfere with their consideration
22 of the evidence.^{FN18}

23 FN18 Defendant also asserts violation of his rights under the
24 Fifth, Sixth, Eighth, and Fourteenth Amendments to the
25 United States Constitution, predicated on the
26 asserted state law error. Because we reject the state law
27 claims, the federal claims also fail.

28 Roybal, 19 Cal. 4th at 530-31 (alterations in original).

As discussed previously, the Supreme Court has held that a penalty phase jury
must not be prevented from considering in mitigation "any aspect of a defendant's
character or record and any of the circumstances of the offense that the defendant
proffers as a basis for a sentence less than death." Lockett, 438 U.S. at 604; see also
Eddings, 455 U.S. at 110. Petitioner contends that the trial court's instructions, given
in response to the jury's reported deadlock, "prohibited the jury from seeing the word
[sic] through Mr. Roybal's eyes," including his impoverished upbringing, abandonment
by his father, the alcoholism in his family, and the abuse and neglect he suffered at the
hands of his mother and stepfather and improperly limited the jury's consideration of
mitigation evidence. (FAP at 347.) He argues that the state court's rejection of this

1 claim unreasonably applied the law to the facts because that court, “in reviewing the
2 instruction, construed it to inform the jurors they should not place themselves in the [sic]
3 Mr. Roybal’s shoes as a man facing possible execution, as an impermissible attempt to
4 avoid responsibility, but that is not what the instruction said.” (Id.)

5 Here, the Court finds no “reasonable likelihood that the jury has applied the
6 challenged instruction in a way that prevents the consideration of constitutionally
7 relevant evidence.” Boyde, 494 U.S. at 380. The jurors were instructed not to place
8 themselves in the shoes of either the victim or the defendant, as the trial court explained
9 that they would likely always vote for death if viewing the case from the victim’s
10 perspective, and always vote for life if viewing the case from the defendant’s
11 perspective. The trial judge directed that “[y]our job is a weighing process that I’ll get
12 to and I’ve already told you about.” (RT 6650.) The trial judge then engaged in a
13 detailed recitation of the aggravating and mitigating factors and again emphasized the
14 weighing process. (See RT 6651-58.)

15 Viewing the instructions and record in context, it appears clear that the trial court’s
16 admonishment to the jurors against placing themselves in the shoes of the victim or the
17 defendant did not preclude their consideration of mitigation. Just after the contested
18 instruction, the trial court recited the factors, which included specific examples of
19 evidence the jurors could consider in mitigation, such as Petitioner’s “mental or
20 emotional disturbance” under factor (d), evidence that “he was impaired as a result of
21 either mental disease or the affects of intoxication” under factor (h) or (k), his age under
22 factor (i), any accomplice evidence under factor (j), and “anything about the defendant,
23 his background, his upbringing, any sympathetic factor and so forth” under factor (k).
24 (RT 6656-57.)

25 “It is of vital importance to the defendant and to the community that any decision
26 to impose the death sentence be, and appear to be, based on reason rather than caprice
27 or emotion.” Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality opinion); see also
28 California v. Brown, 479 U.S. 538, 542-43 (1987) (upholding an instruction directing

1 that jurors should not base their penalty decision on “mere sentiment, conjecture,
 2 sympathy, passion, prejudice, public opinion or public feeling,” reasoning that “a rational
 3 juror could hardly hear this instruction without concluding that it was meant to confine
 4 the jury’s deliberations to considerations arising from the evidence presented, both
 5 aggravating and mitigating.”)

6 In this case, it is evident that the state court reasonably concluded that the
 7 contested instruction did not prevent the consideration of mitigation, but instead
 8 “directed the jurors not to substitute emotion for rational judgment.” Roybal, 19 Cal. 4th
 9 at 530. Petitioner fails to demonstrate that this instruction amounted to error of a
 10 constitutional dimension or “so infected” Petitioner’s trial as to result in a due process
 11 violation. McGuire, 502 U.S. at 72. The California Supreme Court’s rejection of this
 12 claim was neither contrary to, nor an unreasonable application of, clearly established
 13 federal law, nor was it based upon an unreasonable determination of the facts. Petitioner
 14 is not entitled to habeas relief on Claim 22.

15 **12. Claim 23**

16 Petitioner contends that the trial court erred in failing to instruct the jurors on the
 17 presumption of life, in violation of Petitioner’s rights under the Fifth, Sixth, Eighth, and
 18 Fourteenth Amendments to the United States Constitution. (FAP at 348-49.)

19 Petitioner raised this contention as Claim 8 in the state habeas petition.
 20 (Lodgment No. 133.) The California Supreme Court rejected the claim on the merits and
 21 also denied it on procedural grounds with a citation to Dixon, 41 Cal. 2d at 759.
 22 (Lodgment No. 144.) As discussed above in section III.A.1, Respondent has not carried
 23 the burden of showing that Dixon precludes the Court’s review of Claim 23 on the
 24 merits.

25 Petitioner references a number of United States Supreme Court cases which
 26 espouse general principles such as the importance of the presumption of innocence, due
 27 process protections, and that a higher degree of scrutiny is required in capital cases.
 28 (FAP at 349, citing e.g. Estelle v. Williams, 425 U.S. 501 (1976), Gardner v. Florida, 430

1 U.S. 349 (1976), and Godfrey v. Georgia, 446 U.S. 420 (1980).) However, it remains
2 that Petitioner fails to offer any clearly established federal law requiring a “presumption
3 of life” instruction, or dictating that a trial court’s failure to provide such an instruction
4 violates due process. Petitioner also attempts to correlate the guilt phase “presumption
5 of innocence” instruction as mandating a corresponding presumption of life instruction
6 in the penalty phase, but again, fails to cite any clearly established law in support of his
7 argument.

8 The jury was repeatedly instructed that they could only vote for a death sentence
9 under a specific set of circumstances, that: “To return a judgment of death, each of you
10 must be persuaded that the aggravating circumstances are so substantial in comparison
11 with the mitigating circumstances that it warrants death instead of life without parole.”
12 (RT 6551.) The trial judge reiterated this standard in the supplemental jury charge,
13 stating: “That’s the weighing process, and that’s the standard by which you then have to
14 decide whether or not the aggravating factors so outweigh the mitigating factors that you
15 could then render, if you wished, a verdict of death.” (RT 6658.) The plain meaning of
16 these instructions were that the jury could only vote for death if the aggravation was “so
17 substantial” in comparison to the evidence in mitigation- in all other circumstances, the
18 jury must vote for life in prison without the possibility of parole. A jury is presumed to
19 understand and follow the trial court’s instructions. Weeks v. Angelone, 528 U.S. 225,
20 234 (2000); Richardson v. Marsh, 481 U.S. 200, 211 (1989); see also Greer v. Miller,
21 483 U.S. 756, 766 n.8 (1987) (“We normally presume a jury will follow an instruction
22 to disregard inadmissible evidence inadvertently presented to it,”) Petitioner has
23 not met the “especially heavy burden” of showing that the failure to give this instruction
24 amounted to constitutional error. See Villafuerte, 111 F.3d at 624, quoting Kibbe, 431
25 U.S. at 155.

26 Given the absence of any clearly established federal law supporting this
27 contention, the Court cannot conclude that the state court’s adjudication was either
28 contrary to, or an unreasonable application of, clearly established federal law. Petitioner

1 does not merit habeas relief on Claim 23.

2 **13. Claim 24**

3 Petitioner contends that the trial court's instruction and review of the evidence
4 under California Penal Code section 190.3, given in response to the jury's statement that
5 they were deadlocked, erroneously "lessened the impact of the bulk of Mr. Roybal's
6 evidence in mitigation," including the testimony of his mother, brother, other relatives,
7 former employers and counselors. (FAP at 350-51.) Petitioner asserts that the state
8 court's rejection of this claim was both unreasonable under section 2254(d)(1) and also
9 that "its implied finding that this instruction, among the others discussed in this traverse,
10 cured other errors and produced a reliable penalty phase determination was an
11 unreasonable determination of the facts, under 28 U.S.C. § 2254(d)(2)." (Traverse at
12 108.)

13 Petitioner raised this contention as Claim 7 in the state habeas petition.
14 (Lodgment No. 133.) The California Supreme Court rejected the claim on the merits and
15 also denied it on procedural grounds with a citation to Dixon, 41 Cal. 2d at 759.
16 (Lodgment No. 144.) As discussed above in section III.A.1, Respondent has not carried
17 the burden of showing that Dixon precludes the Court's review of Claim 24 on the
18 merits.

19 In response to the deadlock, the trial judge gave the jurors a *sua sponte* instruction
20 which included a recitation of the section 190.3 factors in aggravation and mitigation,
21 including the following portion at issue in this claim:

22 The (k) factor, the last factor, which might be called the mitigating
23 circumstance factor, although all of these other matters may have mitigating
24 parts to them, the (k) factor, I'll just call that the mitigating factor, it's just
an easy handle, entitles you to consider anything about the defendant, his
background, his upbringing, any sympathetic factor and so forth.

25 Now, here is where there was a lot of evidence presented to you. I -
26 - I really can't review all of the evidence for you, but you had expert
27 testimony with regard to the defendant's mental condition, what the nature
of the condition was, if any, whether it was schizoid or antisocial or a
combination thereof, or whatever, those are factors that you can consider.

28 Generally under this section the defendant or the defense side

1 presents evidence to have you consider as mitigating or extenuating
2 circumstances or background of the defendant.

3 (RT 6656-57.)

4 Petitioner relies primarily upon Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007),
5 in which the Supreme Court noted that: “The same principles originally set forth in
6 earlier cases such as Lockett and Eddings have been articulated explicitly by our later
7 cases, which explained that the jury must be permitted to ‘consider fully’ such mitigating
8 evidence and that such consideration ‘would be meaningless’ unless the jury not only
9 had such evidence available to it, but also was permitted to give that evidence
10 meaningful, mitigating effect in imposing the ultimate sentence.” Abdul-Kabir, 550 U.S.
11 at 259, quoting Penry v. Lynaugh, 492 U.S. 302, 322-23 (1989), overruled on other
12 grounds by Atkins v. Virginia, 536 U.S. 304 (2002), and citing Graham v. Collins, 506
13 U.S. 461, 475 (1993). Petitioner argues that the trial judge’s specific mention of the
14 expert testimony about his mental condition precluded or minimized consideration of the
15 other evidence offered in mitigation under factor (k), including family testimony, that of
16 his former employer, and his counselors.

17 A plain reading of the contested instruction does not support Petitioner’s
18 contention. With respect to the factor (k) evidence, the trial court stated that “here is
19 where there was a lot of evidence presented to you,” and that while “I - - I really can’t
20 review all of the evidence for you,” noted the expert testimony about Petitioner’s mental
21 condition. But the trial judge explicitly directed that factor (k) “entitles you to consider
22 *anything about the defendant, his background, his upbringing, any sympathetic factor*
23 *and so forth.*” (RT 6657) (emphasis added.) Given this instruction, the Court remains
24 unpersuaded that the trial judge’s specific mention of the expert mental state testimony
25 somehow obstructed the jury’s consideration of the other factor (k) evidence or negated
26 the impact of that evidence. There is no indication in the record that this mention gave
27 “a judicial *imprimatur* of importance to certain mitigating evidence to the detriment of
28 another.” (FAP at 351) (emphasis in original.) Instead, the trial judge clearly indicated
that there was “a lot of evidence” introduced under factor (k) for the jury’s consideration

1 and that the jurors were entitled to consider “anything” about the defendant’s
2 background and history in making their penalty phase determination.

3 Because Petitioner fails to demonstrate that the trial court’s mention of the expert
4 testimony, as an example of evidence the jury could consider under factor (k),
5 improperly minimized the jurors’ ability to consider the other evidence offered in
6 mitigation, the claim fails. Considering these comments “in the context of the
7 instructions as a whole and the trial record,” Petitioner fails to demonstrate that the
8 instruction “so infected” Petitioner’s trial as to result in a due process violation.
9 McGuire, 502 U.S. at 72. Accordingly, the Court cannot conclude that the California
10 Supreme Court’s rejection of this claim was contrary to, or an unreasonable application
11 of, clearly established federal law, or that the California Supreme Court’s decision was
12 based upon an unreasonable determination of the facts. Petitioner is not entitled to
13 habeas relief on Claim 24.

14 **14. Claim 25**

15 Petitioner contends that several jurors failed to disclose a prior history of child
16 abuse or domestic violence, and that such failures “precluded Mr. Roybal’s trial counsel
17 from exploring or examining whether a particular juror could adequately consider Mr.
18 Roybal’s history of abuse as a mitigating factor.” (FAP at 354.) Petitioner argues that
19 these false answers, evidenced by a post-conviction juror declaration stating that several
20 jurors discussed their experiences with domestic or child abuse during deliberations,
21 indicate bias and demonstrate that he was denied his constitutional right to a trial by an
22 unbiased, impartial jury. (Id.)

23 Petitioner raised this contention as Claim 5 in the state habeas petition.
24 (Lodgment No. 133.) The California Supreme Court denied the claim on the merits
25 without a statement of reasoning. (Lodgment No. 144.)

26 Petitioner argues that this claim should be reviewed de novo “because there was
27 a complete breakdown in the state habeas corpus procedure as a result of the destruction
28 of the trial files by former habeas counsel.” (FAP at 139.) Petitioner contends that “the

1 lack of a complete or even cohesive trial record makes it impossible to determine which
2 facts could have been presented by current habeas counsel or considered by the
3 California Supreme Court in its ‘postcard’ denial on the merits.” (Id.) However,
4 Petitioner fails to persuasively explain how the state supreme court’s consideration of
5 this claim was compromised by the destruction of trial counsels’ files. The jurors’
6 questionnaires, voir dire responses, and the post-trial hearing on juror misconduct are all
7 contained in the trial record, which was preserved, and a copy was lodged with the Court.
8 (See ECF No. 11.) Meanwhile, post-conviction counsel contacted ten of the trial jurors
9 and one alternate, and obtained a declaration from one of the jurors who served on
10 Petitioner’s jury. (See Exs. 31, 32, Lodgment No. 138.) As such, given the lack of any
11 indication that the destruction of trial counsels’ files has actually impacted or
12 compromised the state court’s ability to adjudicate this claim on the present record,
13 Petitioner fails to show that de novo review is appropriate.

14 “[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel
15 of impartial, ‘indifferent’ jurors.” Irvin v. Dowd, 366 U.S. 717, 722 (1961). “Due
16 process means a jury capable and willing to decide the case solely on the evidence before
17 it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the
18 effect of such occurrences when they happen.” Smith v. Phillips, 455 U.S. 209, 217
19 (1982). “*Voir dire* examination serves to protect that right by exposing possible biases,
20 both known and unknown, on the part of potential jurors.” McDonough Power
21 Equipment Inc. v. Greenwood, 464 U.S. 548, 554 (1984). “[T]o obtain a new trial in
22 such a situation, a party must first demonstrate that a juror failed to answer honestly a
23 material question on *voir dire*, and then further show that a correct response would have
24 provided a valid basis for a challenge for cause.” Id. at 556. The Ninth Circuit has also
25 recognized two other types of juror bias, including “actual bias, which stems from a pre-
26 set disposition not to decide an issue impartially,” as well as “implied (or presumptive)
27 bias, which may exist in exceptional circumstances where, for example, a prospective
28 juror has a relationship to the crime itself or to someone involved in a trial, or has

1 repeatedly lied about a material fact to get on the jury.” Fields v. Brown, 503 F.3d 755,
2 766 (9th Cir. 2007).

3 Petitioner contends that “[t]he misconduct in this case, giving knowingly false
4 answers in response to the jury questionnaire, could indicate either actual or implied bias
5 against Mr. Roybal arising from a [sic] deliberately false answers given during *voir*
6 *dire*.” (FAP at 354.) The juror questionnaires included the following two questions:

7 141. Were you or anyone close to you the victim of child molestation or
8 other forms of child abuse?

9 143. Were you or anyone close to you the victim of domestic violence?

10 (CT 2562-64.) Petitioner asserts that of the jurors and alternates that served on
11 Petitioner’s jury, only Juror Boner¹¹ answered that she had been a victim of domestic
12 violence, and answered no to the question about child abuse; all other jurors and
13 alternates answered no to both questions. (FAP at 354, citing CT 2563-64, 2606-07,
14 2647-48, 2689-90, 2731-32, 2774-75, 2816-17, 2858-59, 2900-01, 2942-43, 2984-85,
15 3028-29, 3070-71, 3194-95.) In a post-conviction declaration submitted to the state
16 supreme court, Juror Nelson stated that “[d]uring jury deliberations on the penalty phase,
17 about one half of the jurors discussed incidents of domestic violence and child abuse
18 within their own extended families.” (Ex. 31, Lodgment No. 138 at 1166.) Petitioner
19 contends that “[t]he information provided by Juror Nelson showed misconduct based
20 upon the lack of a truthful answer to questions on the jury questionnaire.” (FAP at 353.)
21 He argues that “[t]he deliberate failure to reveal that a juror had a prior history of
22 domestic violence of [sic] child abuse in her or his family would indicate either actual
23 bias or implied bias against Mr. Roybal,” and contends that the failure to reveal this
24 information on voir dire “precluded Mr. Roybal’s trial counsel from exploring or
25 examining whether a particular juror could adequately consider Mr. Roybal’s history of
26 abuse as a mitigating factor.” (Id. at 354.)

27
28 ¹¹ Juror Boner is referred to as Bonner in the voir dire transcript (see RT 2246, 61-
63), while the completed questionnaire indicates a surname of Boner. (See CT 2960,
62.) The Court will refer to the juror’s last name as written by the juror.

1 Federal Rule of Evidence 606(b) states: “During an inquiry into the validity of a
 2 verdict . . . a juror may not testify about any statement made or incident that occurred
 3 during the jury’s deliberations; the effect of anything on that juror’s or another juror’s
 4 vote; or any juror’s mental processes concerning the verdict or indictment. The Court
 5 may not receive a juror’s affidavit or evidence of a juror’s statement on these matters.”
 6 Fed. R. Ev. 606(b).¹² The Ninth Circuit has found Rule 606(b) applicable to the
 7 consideration of juror declarations in federal habeas proceedings. See e.g., Fields, 503
 8 F.3d at 778. Indeed, the Ninth Circuit has instructed that “the appellate court on appeal
 9 must consider allegations of juror misconduct using only that evidence properly subject
 10 to consideration.” United States v. Bagnariol, 665 F.2d 877, 884 (9th Cir. 1981), citing
 11 Fed. R. Evid. 606(b). “Jurors may testify regarding extraneous prejudicial information
 12 or improper outside influences. They may not be questioned about the deliberative
 13 process or subjective effects of extraneous information, nor can such information be
 14 considered by the trial or appellate courts.” Bagnariol, 665 F.2d at 884-85.

15 Yet, the Ninth Circuit has on a previous occasion indicated that “[s]tatements
 16 which tend to show deceit during voir dire are not barred by [Rule 606(b)].” Hard v.
 17 Burlington Northern R.R., 812 F.2d 482, 485 (9th Cir. 1987), abrogated by Warger v.
 18 Shauers, 574 U.S. ___, 135 S.Ct. 521 (2014). While Hard appears to support the
 19 consideration of Juror Nelson’s statements concerning the discussion of incidents of
 20 domestic violence and child abuse,¹³ despite the fact that it concerns events that took

21
 22 ¹² The Federal Rules of Evidence have enumerated three exceptions to this rule,
 23 allowing juror testimony in the case where the jury was: presented with “extraneous
 24 prejudicial information,” subject to “an outside influence” or “a mistake was made in
 25 entering the verdict.” See Fed. R. Ev. 606(b). Because Petitioner contends that the
 jurors’ dishonesty in voir dire demonstrates bias, rather than juror misconduct as the
 result of a mistake or outside information or influence, it is apparent that these
 exceptions are not applicable to the instant claim.

26 ¹³ Juror Nelson also stated that: “The issue of violence and abuse within the
 27 extended family was discussed and I believe it effected [sic] our deliberations on the
 28 issue of whether to impose the death penalty or life without parole.” (Ex. 31, Lodgment
 No. 138.) The Court is also clearly barred from considering whether such statements had
 an impact on the outcome of their penalty phase deliberations. See Tanner v. United
States, 483 U.S. 107, 117 (1983) (“The near-universal and firmly established common-
 law rule in the United States flatly prohibited the admission of juror testimony to

1 place during deliberations, the Supreme Court recently held that “Rule 606(b) applies to
 2 juror testimony during a proceeding in which a party seeks to secure a new trial on the
 3 ground that a juror lied during *voir dire*.” Warger, 135 S.Ct. at 525. “As enacted, Rule
 4 606(b) prohibited the use of *any* evidence of juror deliberations, subject only to the
 5 express exceptions for extraneous information and outside influences.” Id. at 527.
 6 “Even if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately
 7 assured by the parties’ ability to bring to the court’s attention any evidence of bias before
 8 the verdict is rendered, and to employ nonjuror evidence even after the verdict is
 9 rendered.” Id. at 529.

10 Even were the Court able to consider Juror Nelson’s declaration, Petitioner also
 11 fails to demonstrate that the jurors’ answers in the questionnaires demonstrate any
 12 misconduct or bias. First, Petitioner fails to show that any of the jurors harbored “actual
 13 bias, which stems from a pre-set disposition not to decide an issue impartially.” Fields,
 14 503 F.3d at 766. “Actual bias is typically found when a prospective juror states that he
 15 can not be impartial, or expresses a view adverse to one party’s position and responds
 16 equivocally as to whether he could be fair and impartial despite that view.” Id. at 767.
 17 Based on a review of the record, there is no indication that any juror expressed any
 18 reservations about their ability to act impartially in this case. On the contrary, among the
 19 last questions asked in the written questionnaires were whether “[a]s a result of your
 20 having been asked to fill out this questionnaire, have you formed any opinions about this
 21 case?” and “[i]s there ANYTHING that you would like to bring to the Court’s attention
 22 that might affect your ability to be a fair and impartial juror in this case?” (CT 2580.)
 23 None of the jurors or alternates that sat on Petitioner’s jury indicated that they had
 24 formed an opinion on the case adverse to either side or that there was anything that
 25 would impact their ability to act as a fair and impartial juror. (See CT 2580, 2622, 2664,
 26 2706, 2748, 2791, 2833, 2875, 2917, 2959, 3001, 345, 3211.)

27 Nor does the proffered evidence and argument support a claim of implied bias.

28 _____
 impeach a jury verdict.”)

1 As noted above, the Ninth Circuit has stated that implied bias “may exist in exceptional
2 circumstances where, for example, a prospective juror has a relationship to the crime
3 itself or to someone involved in a trial, or has repeatedly lied about a material fact to get
4 on the jury.” Fields, 503 F.3d at 766. Here, there is no indication that the jurors had any
5 relationship to the crime itself or to any of the participants. Instead, Petitioner asserts
6 that the jurors gave “knowingly false answers in response to the jury questionnaire.”
7 (FAP at 354.)

8 Based on the Court’s review of the record, Petitioner fails to conclusively
9 demonstrate that the jurors were actually dishonest, much less repeatedly so, in failing
10 to mention incidents of abuse in their extended families, and finds no indication of
11 implied bias. This is because the questions posed in the written questionnaire asked only
12 if the jurors or “anyone close to” them had been the victim of child abuse or domestic
13 violence. Juror Nelson’s declaration indicates only that several jurors discussed abuse
14 or domestic violence in their extended families, and a review of the record does not
15 reveal that the trial court ever offered a definition of “anyone close to you.” Given the
16 lack of specific direction or definition, it is unclear whether the jurors would have
17 reasonably considered members of their extended families as being “close to” them.
18 Even assuming that a member of one’s extended family was included in the sphere of the
19 two questions posed, a review of the questionnaires also reveals that several jurors
20 indicated positive responses to a number of related questions regarding experience with
21 violence stemming from alcoholism, as well as questions asking about experience with
22 child abuse or domestic abuse counseling, that reasonably could have contributed to the
23 jurors’ discussions of their experiences with violence and abuse. For instance, Juror
24 Bueche indicated having a relative who had experience working with child abuse
25 counseling, while Juror Teller¹⁴ indicated that her sister worked at a shelter for abused
26 wives and children. (See CT 2605, 3195.) Meanwhile, Juror Christensen noted a bad

27
28 ¹⁴ Juror Teller, originally an alternate juror, was a member of the penalty phase jury
that rendered a verdict, as she replaced Juror Boner during the penalty phase
deliberations. (See RT 6670.)

1 personal experience with drinking, Juror Bell stated that both parents were alcoholics
 2 and mentioned loud fights between them, Juror Teller stated that her first husband was
 3 an alcoholic who was argumentative when drinking, and Juror Boner stated that her
 4 father and several others she knew had drinking problems, in addition to her positive
 5 answers to the questions about child abuse and domestic violence. (See CT 2646, 2687-
 6 88, 2982-85, 3193.)¹⁵

7 Given the vague wording of the questions, rather than speculating as to juror bias,
 8 it is reasonable to conclude that some jurors may not have considered extended family
 9 members to be someone “close.” See Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir.
 10 1998) (en banc) (“The Supreme Court has held that an honest yet mistaken answer to a
 11 voir dire question rarely amounts to a constitutional violation; even an intentionally
 12 dishonest answer is not fatal, so long as the falsehood does not bespeak a lack of
 13 impartiality.”), citing McDonough, 464 U.S. at 555-56. Moreover, the jurors’ responses
 14 to the questions on related topics, such as counseling and alcohol-related violence, could
 15 have reasonably contributed to the discussion Juror Nelson mentioned. The evidence
 16 presented falls far short of that rare case where [the Court] must presume juror bias.”
 17 Dyer, 151 F.3d at 973-83 (juror who failed to disclose information about her brother
 18 being the victim of a homicide, later lied and stated she thought the crime was an
 19 accident, failed to mention being the victim of several burglaries, and did not disclose
 20 her husband’s recent arrest and jailing or the arrests of several other relatives was
 21 impliedly biased, as “[a] juror . . . who lies materially and repeatedly in response to
 22 legitimate inquiries about her background introduces destructive uncertainties into the
 23 process.”); see also Green v. White, 232 F.3d 671, 676-78 (9th Cir. 2000) (juror’s
 24 repeated lies about prior felony conviction, biased statements against defendant and

25
 26 ¹⁵ The relatedness of the topics of child abuse, domestic violence, and violence as
 27 a result of alcoholism in families is also supported by trial counsel’s post-trial
 28 declaration, in which she indicates that her investigator interviewed the jurors after trial
 to ask about the jurors’ personal experiences mentioned during deliberations. (CT 2256.)
 Juror Thomas told the investigator some jurors “were children that had been abused by
 their parents and some were children of alcoholic families,” while Juror Nelson stated
 only that “some jurors mentioned abuse in their families.” (Id.)

1 questionable conduct “raises serious questions about his ability to impartially serve on
2 a jury.”)

3 Finally, there is no indication of McDonough-type bias, which requires a showing
4 that “a juror failed to answer honestly a material question on *voir dire*, and []that a
5 correct response would have provided a valid basis for a challenge for cause.” Id., 464
6 U.S. at 556. First, as with implied bias, Petitioner has not persuasively shown that jurors
7 were dishonest in answering questions about abuse and domestic violence. Moreover,
8 McDonough requires that a correct response would have been a “valid basis for a
9 challenge for cause.” Id. at 566. Here, Petitioner fails to show that being a victim of
10 child abuse or domestic violence, or someone close to a victim, would have provided a
11 basis for challenging such a prospective juror for cause. For instance, Petitioner
12 challenged Juror Boner based on her experiences with abuse and her attitudes towards
13 it, but the challenge was unsuccessful. (RT 2246-66.) This strongly suggests that
14 Petitioner’s efforts to remove prospective jurors for cause, solely based on positive
15 responses regarding abuse of others, would have been unsuccessful. As such, Petitioner
16 fails to demonstrate that abuse in history would have provided a “valid basis” for a
17 challenge for cause in this case, given that the trial court rejected the argument that Juror
18 Boner’s experiences and attitudes provided persuasive grounds for removing her from
19 the jury panel. Moreover, prospective jurors Cartagena and Kelly each indicated abuse
20 in their families during *voir dire* questioning, and both parties passed for cause. (RT
21 1388-90, 1588-93.) Prospective juror Rogers also indicated experiences with physical
22 abuse as a result of her ex-husband’s drinking, and served as an alternate juror at
23 Petitioner’s trial. (RT 1988-04.)

24 Here, the proffered juror declaration, even if it could be considered, only indicates
25 several jurors mentioned abuse or violence in their extended families during
26 deliberations. Given the lack of definition of the term “close to you,” and the affirmative
27 responses to related questions about alcoholism in their families, violence from
28 alcoholism, and domestic violence or abuse counseling, Juror Nelson’s declaration does

1 not support a conclusion that the jurors were dishonest in their questionnaires or during
 2 *voir dire*. Moreover, in light of Petitioner's failure to demonstrate that an affirmative
 3 response to the cited questions would have provided a valid basis for a challenge,
 4 Petitioner fails to establish a claim of McDonough-type bias.

5 In sum, Petitioner has not demonstrated that the jurors' questionnaire and *voir dire*
 6 responses, when compared to their discussion during deliberations, evidence bias against
 7 Petitioner, for even if the jurors misconstrued the cited questions and failed to disclose
 8 experience with child abuse or domestic violence in their extended families, the claim
 9 fails in the absence of any indication that the jurors lacked impartiality. The California
 10 Supreme Court's rejection of this claim was neither contrary to, nor an unreasonable
 11 application of, clearly established federal law. Petitioner is not entitled to habeas relief
 12 or an evidentiary hearing on Claim 25. See Totten v. Merkle, 137 F.3d 1172, 1176 (9th
 13 Cir. 1998) ("[A]n evidentiary hearing is *not* required on issues that can be resolved by
 14 reference to the state court record.")

15 **B. PROSECUTORIAL MISCONDUCT CLAIMS**

16 **1. Claim 3**

17 Petitioner asserts that when the prosecutor objected to defense-elicited testimony
 18 and stated that Petitioner was "not unavailable" to testify, that remark constituted a
 19 comment on the fact that Petitioner had not testified, in violation of the United States
 20 Constitution. (FAP at 224-27.)

21 The California Supreme Court considered and rejected this claim on appeal as
 22 follows:

23 Defendant sought to elicit testimony from Frank Orozco, his half
 24 brother, that he had planned to return to Santa Fe before Yvonne Weden
 25 was killed. The People objected to the testimony on hearsay grounds; the
 26 superior court ruled it admissible to show defendant's state of mind. The
 27 prosecutor argued: "The declarant is not unavailable, your honor," to which
 28 the superior court responded, "He is not unavailable at this juncture." Later,
 outside the presence of the jury, defendant moved for a mistrial, claiming
 that the prosecutor's comment was a "flag to the jury that the defendant was
 not testifying in the case and he was available to testify." The superior court
 denied the motion, explaining that it "took the objection as a legal
 objection, just as though it were a statement, hearsay, and an adjunct to that,

1 and not as a comment to the jury.” Defendant requested the superior court
 2 to “consider” admonishing the jurors that he had the right not to testify. The
 3 superior court observed that it had previously so instructed “almost ad
 4 nauseam” during voir dire, and stated that it would “of course” so instruct
 5 the jury again at the end of the case. At the conclusion of both the guilt and
 6 penalty phases, it gave an instruction to the effect that defendant had a right
 7 not to testify and no adverse inferences should be drawn from his failure to
 8 do so.

9 Defendant claims that the prosecutor committed error under *Griffin*
 10 *v. California* (1965) 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106]. The
 11 point lacks merit.

12 *Griffin* holds that the privilege against self-incrimination of the Fifth
 13 Amendment prohibits any comment by the prosecution on a defendant’s
 14 failure to testify at trial that invites or allows the jury to infer guilt
 15 therefrom. (380 U.S. at pp. 611-615 [85 S.Ct. at pp. 1231-1233].) We apply
 16 a “reasonable likelihood” standard for reviewing prosecutorial remarks,
 17 inquiring whether there is a reasonable likelihood that the jurors
 18 misconstrued or misapplied the words in question.

19 No error appears. Considered in context, there is no reasonable
 20 likelihood that the prosecutor’s hearsay objection concerning Frank
 21 Orozco’s testimony about defendant’s desire to return to Santa Fe could
 22 have led jurors to misconstrue the objection as a reference to defendant’s
 23 failure to testify. The comment was in the form of a legal objection, not a
 24 remark directed to the jury; it was not reasonably likely that jurors were
 25 misled into believing otherwise or that it would have increased the jury’s
 26 inclination to treat the defendant’s silence as an indication of his guilt.^{FN9}

27 FN9 Defendant also asserts that the prosecutor’s comment
 28 violated the Fifth, Eighth, and Fourteenth Amendments to the
 United States Constitution. The claims, which derive from the
 claim of *Griffin* error, are similarly without merit.

19 Roybal, 19 Cal. 4th at 514-15.

20 The Fifth Amendment to the United States Constitution “forbids either comment
 21 by the prosecution on the accused’s silence or instructions by the court that such silence
 22 is evidence of guilt.” Griffin v. California, 380 U.S. 609, 615 (1965). “While a direct
 23 comment about the defendant’s failure to testify always violates Griffin, a prosecutor’s
 24 indirect comment violates Griffin only ‘if it is manifestly intended to call attention to the
 25 defendant’s failure to testify, or is of such a character that the jury would naturally and
 26 necessarily take it to be a comment on the failure to testify.’” Hovey v. Ayers, 458 F.3d
 27 892, 912 (9th Cir. 2006), quoting Lincoln v. Sunn, 807 F.2d 805, 809 (9th Cir. 1987).

28 As the California Supreme Court recounted during the guilt phase proceedings,

1 defense counsel posed a question to Petitioner's brother Frank about whether Petitioner
 2 had indicated a desire to go to Santa Fe prior to the date of the victim's murder,
 3 prompting the prosecutor to object on hearsay grounds. The trial court overruled the
 4 objection, finding the evidence admissible as to Petitioner's state of mind. Shortly
 5 thereafter, the following testimony and exchange occurred:

6 Q: When was the last time that you know that he said he wanted to go
 7 to Santa Fe?

8 A: The last time was that Saturday morning.

9 Q: Did he indicate anything about the reasons being you or your wife?

10 A: He indicated, yes, that my wife was treating him like a slave.

11 [Prosecutor]: Objection again, Your Honor, continuing objection to
 12 all this testimony.

13 The Court: Ladies and Gentlemen, this is being received as it
 14 applies to the declarant's state of mind, which is an
 15 exception to the hearsay rule. And I will let the
 16 attorneys argue at that time during the argument as to
 17 the probative value of this statement, but the objection
 18 is overruled. [¶] You have a continuing objection.

16 [Prosecutor]: Well, the declarant is not unavailable, Your Honor.

17 The Court: He is unavailable at this juncture.
 18 You may continue your answer.

19 (RT 4574.)

20 A short time later, outside the presence of the jury, defense counsel moved for a
 21 mistrial pursuant to Griffin, which the trial court denied, stating: "I took the objection
 22 as a legal objection, just as though it were a statement, hearsay, and an adjunct to that,
 23 and not as a comment to the jury. I overruled the objection. Mr. Koerber [the
 24 prosecutor] still contends that my ruling was in error. [¶] Be that as it may, the motion
 25 to dismiss is denied." (RT 4615-16.) Upon continued argument by the defense, the trial
 26 court stated: "As I've observed, I received that objection as a legal objection. I didn't
 27 regard it as a speaking objection arguing the case in front - - or the objection in front of
 28 the jury. [¶] I'll observe that if the prosecution makes a reference to the defendant's

1 refusal to testify, of course, [the] prosecution would be treading on very thin grounds to
2 do so. But that, I don't perceive, has been done at this juncture." (RT 4616.)

3 Petitioner alleges Griffin error arising from the fact that "the jury twice heard a
4 'speaking objection' beyond an objection on hearsay grounds designed to cause the jury
5 to note the [sic] Mr. Roybal was not testifying," and asserts that the comment was not
6 accidental, but that "[w]hen the prosecutor referred to the availability of Mr. Roybal as
7 the declarant to testify, that reference added nothing to the previous objection, but it had
8 one purpose and one purpose only: to draw the jury's attention to the fact that Mr.
9 Roybal was available to testify, but had not." (FAP at 228.)

10 Here, as both the trial court and the California Supreme Court reasonably
11 concluded, the prosecutor's comments did not fall under Griffin, as the comments were
12 not directed to the jury, but instead were made in support of a hearsay objection directed
13 solely to the trial court. Moreover, any possible prejudice arising from the comments
14 was countered by the trial court's instructions to the jurors at the conclusion of the guilt
15 phase that: "A defendant in a criminal trial has a constitutional right not to be compelled
16 to testify. You must not draw any inference from the fact that the defendant does not
17 testify. Further, you must neither discuss this matter nor permit it to enter into your
18 deliberation in any way." (RT 4853.) The trial court also instructed the jurors that
19 "[s]tatements made by the attorneys during trial are not evidence." (RT 4842.) A jury
20 is presumed to understand and follow the trial court's instructions. See Weeks, 528 U.S.
21 at 234; Marsh, 481 U.S. at 211; see also Miller, 483 U.S. 756, 766 n.8 ("We normally
22 presume a jury will follow an instruction to disregard inadmissible evidence
23 inadvertently presented to it,")

24 Thus, even were this Court to conclude that the prosecutor's ill-founded hearsay
25 objection (which erroneously assumed the unavailability of a declarant is a predicate for
26 the state-of-mind exception to hearsay) contained a comment on Petitioner's failure to
27 testify in violation of Griffin, the comments were of such an indirect nature that any
28 possible error was rendered harmless by the trial court's instructions to the jury

1 emphasizing that Petitioner had a constitutional right not to testify, that his failure to
 2 testify could not be considered in the jury's deliberations, and that the comments of
 3 counsel were not evidence. See Brecht, 507 U.S. at 637 (habeas relief not available
 4 unless error had a "substantial and injurious effect or influence in determining the jury's
 5 verdict.")

6 Because Petitioner fails to show that the California Supreme Court's rejection of
 7 this claim on appeal was either contrary to, or an unreasonable application of, clearly
 8 established federal law, or that it was based on an unreasonable determination of the
 9 facts, he is not entitled to habeas relief on Claim 3.

10 **2. Claim 12**

11 Petitioner contends that the prosecutor's closing argument "undermined the
 12 reliability of the penalty determination process in his case," arguing that it "interject[ed]
 13 an interpretation of the Bible which is at odds with California's death penalty statutes,"
 14 the argument "diminished the jurors' sense of responsibility for decision making by
 15 positing that the proper decision had been foreordained by a higher law," and it
 16 "provided a religious imperative to refuse to consider mitigating circumstances." (FAP
 17 at 290.)

18 The California Supreme Court rejected Claim 12 on direct appeal, finding that the
 19 claim was not preserved for review, but nevertheless failed on the merits due to a lack
 20 of prejudice. For the reasons discussed above in section III.A.2, this court will address
 21 the merits of Claim 12. The California Supreme Court stated:

22 Toward the end of closing argument, the prosecutor referred to the
 23 Penal Code and then continued: "There is another book, written long ago,
 24 that mentions the crime of murder, and mentions what is the appropriate
 25 penalty for the crime of murder, and that book says a couple of different
 26 things. It says, 'Thou shalt not steal.' It says, 'Thou shalt not kill.' It says
 27 'And if he smite with an instrument of iron so that he die, he is a murderer.
 28 The murderer shall surely be put to death.' [¶] It says, moreover, 'Ye shall
 take no satisfaction for the life of a murderer which is guilty of death, but
 shall be surely put to death.'" Defendant did not object.

Defendant contends that the prosecutor's reference to biblical law
 constituted prejudicial misconduct. Although he concedes that his counsel
 failed to object, he contends that the prosecutor's argument was so

1 egregious that a timely objection resulting in an admonition by the superior
2 court would, in any event, have been ineffective to cure the harm. The claim
3 fails.

4 As a threshold matter, because he did not object to the prosecutor's
5 remarks, defendant failed to preserve the claim of prosecutorial misconduct
6 for review. (*People v. Wash* (1993) 6 Cal.4th 215, 259-260 [24 Cal.Rptr.2d
7 421, 861 P.2d 1107].) But the claim also fails on its merits, in the absence
8 of prejudice.

9 It is well settled that biblical law has no proper role in the sentencing
10 process. "Penalty determinations are to be based on the evidence presented
11 by the parties and the legal instructions given by the court. Reference by
12 either party to religious doctrine, commandments or biblical passages
13 tending to undermine that principle is improper. . . . What is objectionable
14 is reliance on religious authority as supporting or opposing the death
15 penalty. The penalty determination is to be made by reliance on the legal
16 instructions given by the court, not by recourse to extraneous authority."
17 (*People v. Sandoval* (1992) 4 Cal.4th 155, 194 [14 Cal.Rptr.2d 342, 841
18 P.2d 862].) "Argument of this sort by a representative of the government
19 offends California statutes and judicial decisions, which establish the
20 positive, secular law of this state as the rule governing the choice between
21 life and death. [Citation.] It also violates the United States and California
22 Constitutions" (*Id.* at p. 200 (conc. and dis. opn. of Mosk, J.).)

23 As a general matter, reversal for error under California law requires
24 prejudice, and prejudice, in turn, requires a reasonable possibility of an
25 effect on the outcome when, as here, penalty in a capital trial is involved.
26 (*People v. Gordon* (1990) 50 Cal.3d 1223, 1253 [270 Cal.Rptr. 451, 792
27 P.2d 251]; *People v. Brown* (1988) 46 Cal.3d 432, 446-448 [250 Cal.Rptr.
28 604, 758 P.2d 1135].) Similarly, it is the general rule for error under the
United States Constitution that reversal requires prejudice and prejudice, in
turn, is presumed unless the government shows that the defect was harmless
beyond a reasonable doubt. (See, e.g., *Rose v. Clark* (1986) 478 U.S. 570,
576-579 [106 S.Ct. 3101, 3105-3107, 92 L.Ed.2d 460].)

The prosecutor's reference to biblical authority was clear misconduct.
There could be no purpose for this portion of the argument other than to
invite the jury to find support for a death verdict in the religious text.

Although we condemn the prosecutor's biblical references as
misconduct, we also conclude that the misconduct was not prejudicial under
the circumstances of this case. The prosecution's argument focused
primarily, and at great length, on the brutal circumstances of the crime. He
argued that although the jurors, under penalty factor (k) of Penal Code
section 190.3, could be asked to show sympathy and mercy in fixing the
punishment, defendant had shown no sympathy or mercy for Yvonne
Weden. His brief allusions to biblical law amounted to little more than
commonplaces, to emphasize his point that the jurors should instead judge
defendant primarily by his acts. In context, the remarks could not have
diminished a reasonable juror's sense of responsibility or displaced the
superior court's instructions concerning the application of the Penal Code.

FN13

FN13 Defendant also argues that his trial counsel's failure to

1 object to the prosecutor's remarks violated his right to
2 effective assistance of counsel. He cannot make such a
showing; there was no prejudicial prosecutorial misconduct.

3 Roybal, 19 Cal. 4th at 519-21 (alterations in original).

4 Clearly established federal law holds that prosecutorial misconduct, such as
5 inappropriate comments during arguments, warrants habeas relief when the conduct "so
6 infected the trial with unfairness as to make the resulting conviction a denial of due
7 process." Darden v. Wainwright, 477 U.S. 168, 181 (1986), quoting Donnelly v.
8 DeChristoforo, 416 U.S. 637, 643 (1974). "[I]t 'is not enough that the prosecutors'
9 remarks were undesirable or even universally condemned." Darden, 477 U.S. at 181,
10 quoting Darden v. Wainwright, 699 F.2d 1031, 1036 (11th Cir. 1983).

11 "[T]he touchstone of due process analysis in cases of alleged prosecutorial
12 misconduct is the fairness of the trial, not the culpability of the prosecutor." Smith v.
13 Phillips, 455 U.S. 209, 219 (1982). Alleged instances of misconduct must be reviewed
14 "in the context of the entire trial." Donnelly, 416 U.S. at 639; see also Miller, 483 U.S.
15 at 765-66, citing Darden, 477 U.S. at 179 and Donnelly, 416 U.S. at 639. Habeas relief
16 is warranted only if the error "had substantial and injurious effect or influence in
17 determining the jury's verdict." Brecht, 507 U.S. at 637.

18 The California Supreme Court concluded that the prosecutor's biblical references
19 constituted "clear misconduct," and was to be "condemn [ed]." The California Supreme
20 Court held, however, the misconduct was not prejudicial. Roybal, 19 Cal. 4th at 521.
21 The California Supreme Court was correct in concluding that the prosecutor's comments
22 constituted misconduct, given that "religious arguments have been condemned by
23 virtually every federal and state court to consider their challenge." Sandoval v.
24 Calderon, 241 F.3d 765, 777 (9th Cir. 2001) (collecting cases); see Roybal, 19 Cal. 4th
25 at 520 ("[I]t is well settled that biblical law has no proper role in the sentencing
26 process."). It is without question that the prosecutor improperly urged the jurors to
27 impose a death sentence on Petitioner based on biblical law. He first cited state law,
28 which provided for imposition of the death penalty for "certain crimes, special

1 circumstance crimes, crimes like [Petitioner] has been convicted of,” then immediately
 2 after, began to discuss and quote from “another book, written long ago, that mentions the
 3 crime of murder, and mentions what is the appropriate penalty for the crime of murder.”
 4 (RT 6470.) In doing so, he clearly and improperly advocated that religious authority
 5 supported a death verdict. Yet the prosecutor did not stop with simply drawing parallels
 6 between state law and biblical law which, in itself, would have been misconduct. He
 7 went on to quote directly from the Bible, asserting that biblical text demanded a specific
 8 punishment for murder: “And if he smite with an instrument of iron so that he die, he is
 9 a murderer. The murderer shall surely be put to death.”¹⁶ (Id.) Even after that clear
 10 invocation of biblical authority (i.e. God mandates that someone who kills with a knife
 11 must be put to death), the prosecutor continued with another direct quote from the Bible,
 12 imploring that: “Ye shall take no satisfaction for the life of a murderer which is guilty
 13 of death, but shall surely be put to death.”¹⁷ (Id.) Such argument could only have been
 14 meant to urge the jurors to find justification for a death sentence in biblical text,
 15 authority well outside the penal code, and to subvert or frustrate their consideration of
 16 the proper sentencing factors under state law. See Caldwell v. Mississippi, 472 U.S. 320,
 17 328-29 (1985) (“[I]t is constitutionally impermissible to rest a death sentence on a
 18 determination made by a sentencer who has been led to believe that the responsibility for
 19 determining the appropriateness of the defendant’s death rests elsewhere.”); see also
 20 Sandoval, 241 F.3d 765, 777 (9th Cir. 2000) (“[D]elegation of the ultimate responsibility
 21 for imposing a sentence to divine authority undermines the jury’s role in the sentencing
 22 process.”) As the California Supreme Court reasoned, “[t]here could be no purpose for
 23 his portion of the argument other than to invite the jury to find support for a death verdict
 24 in the religious text.” Roybal, 19 Cal. 4th at 521.

25 While the California Supreme Court accurately concluded that such comments had
 26

27 ¹⁶ (See Numbers 35:16, King James Bible.)

28 ¹⁷ (See Numbers 35:31, King James Bible.)

1 “no proper role in the sentencing process” and amounted to error under both the
 2 California and United States Constitutions, that court unreasonably found that the
 3 comments were harmless and that the prosecutor’s improper comments were simple
 4 “commonplaces” that, given the remainder of the prosecutor’s closing argument, “could
 5 not have” diminished the jury’s sense of responsibility nor replaced the trial court’s
 6 instructions. Id. at 520-21. In so concluding, the California Supreme Court erroneously
 7 cited the prosecutor’s reference to Petitioner’s “acts” as an example of proper argument.
 8 The California Supreme Court reasoned that the comments at issue were mere
 9 “commonplaces, to emphasize his point that the jurors should instead judge defendant
 10 primarily by his acts,” and noted that the prosecutor’s “argument focused primarily, and
 11 at great length, on the brutal circumstances of the crime.” Id. Admittedly, the majority
 12 of the prosecutor’s argument was focused on the murder itself but, again, with a biblical
 13 tone: “The main thing, the primary thing for you to consider is his acts. By his acts he
 14 will be judged.” (RT 6470.) But this argument too, bears a strong resemblance to
 15 language found in the Bible, and followed just after the direct biblical quotations.¹⁸
 16 Thus, even if the reference to Petitioner’s acts was not itself an explicit biblical quote or
 17 allusion, it could not cure or ameliorate the other biblical references, particularly given
 18 the context in which it was employed.

19 This court disagrees with the California Supreme Court’s characterization of the
 20 prosecutor’s direct biblical quotations as simple “commonplaces.” The prosecutor
 21 quoted directly and repeatedly from Scripture demanding that a murderer “shall surely
 22 be put to death.” It is evident that the prosecutor meant to intentionally and forcefully
 23 argue that religious authority mandated the death penalty. Had the prosecutor ceased
 24 referencing biblical passages after reciting “thou shalt not steal” or “thou shalt not kill,”
 25

26 ¹⁸ The Bible repeatedly references judging individuals for their actions, including
 27 passages such as “they were judged every man according to their works,” that “every
 28 man according to his deeds,” and “according to their way and according to their doings
 I judged them.” (See e.g. Revelations 20:13, Romans 2:6, Ezekiel 36:19, King James
 Bible.)

1 perhaps the California Supreme Court could have accurately discounted such references
2 as “commonplaces,” but the reasonableness of the state court’s conclusion is undermined
3 by the deeply religious context of repeated biblical exhortations. It was objectively
4 unreasonable for the California Supreme Court to dismiss the impact of the prosecutor’s
5 pointed and repeated biblical quotations commanding that a murderer such as Petitioner
6 must be put to death as “mere commonplaces.”

7 More importantly, the California Supreme Court analyzed prejudice too narrowly,
8 by concluding there was a lack of prejudice because the prosecutor’s argument
9 “primarily” focused on the proper factors for consideration. While it is true that the
10 contested comments comprised only a few transcript pages of the prosecutor’s lengthy
11 closing argument which focused primarily on the evidence related to the murder, related
12 special circumstance, and mitigation issues, the Supreme Court has instructed that
13 misconduct be reviewed “in the context of the entire trial” to determine whether such
14 error was prejudicial. See Donnelly, 416 U.S. at 639; see also Miller, 483 U.S. at 765-
15 66, citing Darden, 477 U.S. at 179 and Donnelly, 416 U.S. at 639. The circumstances
16 of this case strongly suggest the prosecutor’s remarks were anything but harmless. This
17 was an extremely close penalty phase case. After a nine-day penalty phase during which
18 the jury heard evidence of Petitioner’s deprived upbringing, which was replete with
19 physical and emotional abuse and neglect, substance abuse that started before age ten,
20 and significant brain dysfunction and damage, the jury then deliberated for portions of
21 six court days before reaching a death verdict. The deliberations included requests to
22 read back the testimony of Petitioner’s alcoholic and neglectful mother, who nicknamed
23 Petitioner “Mojo” or “Mojado”, a Spanish word for the pejorative term “wetback,” and
24 who once offered to give Petitioner up in order to keep her cuckolded husband. The
25 jurors also asked for read backs of the testimony from both mental health experts who
26 testified at length about Petitioner’s brain dysfunction, long-standing substance abuse,
27 personality disorders, and the possibility that he suffered from fetal alcohol effects from
28 his mother’s alcohol use when pregnant. On both the third and fourth day of

1 deliberations, the jurors sent notes to the trial court expressing their inability to reach a
2 verdict. Unquestionably, the jurors struggled with their decision.

3 Here, where the state's case on guilt was entirely circumstantial, with lingering
4 questions regarding the blood evidence, and where the death verdict was so obviously
5 close and difficult, it was objectively unreasonable for the California Supreme Court to
6 expressly limit its analysis of prejudice flowing from the context of the religious
7 elements of the prosecutor's closing argument to the argument itself.

8 "In determining whether a comment rendered a trial constitutionally unfair, factors
9 we may consider are whether the comment misstated the evidence, whether the judge
10 admonished the jury to disregard the comment, whether the comment was invited by
11 defense counsel in its summation, whether defense counsel had an adequate opportunity
12 to rebut the comment, the prominence of the comment in the context of the entire trial
13 and the weight of the evidence." Hein v. Sullivan, 601 F.3d 897, 912-13 (9th Cir. 2010),
14 citing Darden, 477 U.S. at 182. "The Darden factors . . . require courts to place improper
15 argument in the context of the entire trial to evaluate whether its damaging effect was
16 mitigated or aggravated." Hein, 601 F.3d at 914.

17 In this case, the California Supreme Court's perfunctory conclusion that the
18 prosecutor's highly improper remarks "could not have" diminished the jury's sense of
19 responsibility was reached by erroneously restricting its examination to the remainder
20 of the prosecutor's closing argument and by brusquely dismissing the extended and
21 repeated biblical quotations as "mere commonplaces." In light of the requirement that
22 such misconduct be reviewed in the context of the entire trial, the California Supreme
23 Court's cursory analysis and conclusory rejection of this error as harmless was not
24 merely erroneous, it was objectively unreasonable. Because the California Supreme
25 Court's harmlessness determination was unreasonable, Petitioner has satisfied section
26 2254(d). See Ayala, 135 S.Ct. at 2199 ("When a Chapman decision is reviewed under
27 AEDPA, 'a federal court may not award habeas relief under 2254 unless *the*
28 *harmlessness determination itself* was unreasonable.'"), quoting Fry, 551 U.S. at 119

1 (emphasis in original); Mitchell v. Esparza, 540 U.S. 12, 18-19 (2003).

2 “[C]apital punishment decisions [are premised] on the assumption that a capital
3 sentencing jury recognizes the gravity of its task and proceeds with the appropriate
4 awareness of its ‘truly awesome responsibility.’” Caldwell, 472 U.S. at 341. In
5 Caldwell, the “prosecutor urged the jury not to view itself as determining whether the
6 defendant would die, because a death sentence would be reviewed for correctness by the
7 State Supreme Court.” Id. at 323. The prosecutor’s rebuttal comments were made in
8 response to defense counsel’s argument to the jury during the penalty phase to the effect
9 that life is “precious,” defendant’s “life rests in your hands,” “[y]ou can give him life or
10 death,” “we are taught that an eye for an eye is not the solution,” and it “is an awesome
11 responsibility” to decide defendant’s fate. Id. at 324. In rebuttal, the prosecutor stated
12 that the approach taken by the defense was “unfair.” “I think the lawyers know better.
13 Now, they would have you believe that you’re going to kill this man and they
14 know—they know that your decision is not the final decision.” The prosecutor then
15 referred to a biblical reference made by defense counsel (“Thou shall not kill”) and stated
16 that defense counsel wrongfully insinuated that, after the jury’s verdict of death, the
17 defendant would be taken out of the courthouse “in moments and string him up.” Id. at
18 325. The prosecutor then stated that any “decision you render is automatically
19 reviewable by the Supreme Court.” Id.

20 Honing in on the prosecutor’s brief but limited argument targeting a juror’s sense
21 of personal decision-making for determinations of death, the Supreme Court held that
22 “it is constitutionally impermissible to rest a death sentence on a determination made by
23 a sentencer who has been led to believe that the responsibility for determining the
24 appropriateness of the defendant’s death rests elsewhere.” Id. at 328-29. In light of the
25 perception that jurors could reasonably believe that the state supreme court would have
26 the ultimate responsibility to review the death sentence - - despite numerous instructions
27 and admonitions to the jury that only the jury determined the fact of death - - the
28 Supreme Court vacated the sentence of death.

1 Here, the prosecutor's unambiguous, repeated, and carefully timed improper
 2 exhortations to the jury to apply biblical law diminished the jurors' sense of personal
 3 decision-making for the imposition of the death penalty. In so many words, the jury was
 4 informed that the Bible requires a murderer who kills with iron (i.e. knife) to himself be
 5 put to death. The prosecutor's improper argument presented an intolerable danger that
 6 the jury minimized its role as factfinder and encouraged jurors to vote for death because
 7 it was God's will, and not that the imposition of the death penalty complied with
 8 California and federal law. In Caldwell the Supreme Court found that the few references
 9 to judicial review in the prosecutor's rebuttal argument was sufficient to relieve the
 10 jurors of their sense of personal decision-making because they were informed that the
 11 state supreme court would review the correctness of any decision reached by the jury.
 12 Here, in contrast to Caldwell where the prosecutor's comments suggested that the
 13 ultimate determination of death is delegated to "mere" mortal judges, the prosecutor in
 14 this case urged jurors to impose the death penalty because God mandates that a murderer
 15 who kills with a knife should himself be put to death. The prosecutor's repeated
 16 exhortations to apply biblical law diminished the jurors sense of personal decision-
 17 making and "was fundamentally incompatible with the Eighth Amendment's heightened
 18 'need for reliability in the determination that death is the appropriate punishment in a
 19 specific case.'" Id. (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

20 Indeed, it may be logically inferred that the biblical exhortations could have been
 21 used in deliberations to overcome any reluctance to invoke the death sentence for lack
 22 of evidentiary support. The jury deliberated for six days during the penalty phase;
 23 requested numerous read backs of testimony; informed the trial judge on two separate
 24 occasions that they were deadlocked on the appropriate penalty; and a juror was removed
 25 during the deliberations.¹⁹ By any measure, this was an extremely close penalty phase
 26 trial where the prosecution sought to impermissibly minimize the jury's sense of personal

27
 28 ¹⁹ The excused juror experienced a family emergency during deliberations and an
 alternate juror substituted in on the sixth day of deliberations. (See RT 6670-75.)

1 decision-making in violation of the Eighth Amendment.

2 Even though Petitioner has satisfied AEDPA, the Court must still apply the Brecht
3 test to determine if this error was prejudicial. See Brecht, 507 U.S. at 637 (habeas relief
4 is warranted only if the error “had substantial and injurious effect or influence in
5 determining the jury’s verdict.”); Fry, 551 U.S. at 119, 121-22 (AEDPA established “a
6 precondition to the grant of habeas relief . . . not an entitlement to it,” and “in § 2254
7 proceedings a court must assess the prejudicial impact of constitutional error in a state-
8 court criminal trial under the ‘substantial and injurious effect’ standard set forth in
9 Brecht, supra, whether or not the state appellate court recognized the error and reviewed
10 it for harmlessness. . . .”); Ayala, 135 S.Ct. at 2199 (“[A] prisoner who seeks federal
11 habeas corpus relief must satisfy Brecht, and if the state court adjudicated his claim on
12 the merits, the Brecht test subsumes the limitations imposed by AEDPA.”)

13 A review of the record in this case compels the conclusion that Petitioner has
14 satisfied Brecht, as the Court is persuaded that the prosecutor’s biblical argument had
15 “substantial and injurious effect or influence in determining the jury’s verdict.” Id., 507
16 U.S. at 637. First, because trial counsel failed to object to the prosecutor’s obviously
17 improper remarks, as discussed further in Claim 9, the trial court did not give any
18 specific curative instruction nor was any attempt made to curtail or mitigate the impact
19 of the misconduct. Moreover, in contrast to Claim 13, where the prosecutor’s
20 misstatement of law about the penalty phase determination was effectively countered by
21 the trial court’s explicit instructions on how the jurors must weigh the circumstances in
22 aggravation and mitigation, the prosecutor’s sermonizing went completely unabated and
23 unaddressed. At the conclusion of the penalty phase proceedings, the trial court simply
24 reminded the jurors that statements made by counsel were not evidence and that they
25 must base their decision on the evidence and the law. (RT 6336-37, 6341; RT 6333.)
26 This general admonition was insufficient to cure the misconduct or blunt the impact of
27 this highly improper argument. Moreover, there is absolutely no indication in the record
28 that the religious appeal was invited by defense counsel’s own actions or argument, nor

1 does the record reflect that defense counsel either addressed the remarks or responded
2 in any fashion.

3 The Ninth Circuit’s decision in Sandoval is instructive in determining prejudice.
4 The prosecutors in both cases advocated to the jurors that biblical authority supported
5 imposition of the death penalty and repeatedly quoted Scripture in support of that
6 argument. As in Sandoval, “[t]his is not a case where the evidence overwhelmingly
7 supported the jury’s verdict. The issue was life and death and the jury was sharply
8 divided.” Id., 241 F.3d at 779. Citing the length of deliberations, the jurors’ extended
9 deadlock and clearly expressed difficulty in making the penalty decision, as well as the
10 significant evidence presented in mitigation, the Ninth Circuit reasoned that “[w]e do not
11 know what actually happened in the jury room, but we cannot assume that the
12 prosecutor’s religious argument did not persuade at least one of the jurors to change a
13 vote for life to death . . .” Id.

14 In Sandoval, the jury deliberated on four counts and “was divided 6-6 on two of
15 the counts and 7-5 on the other two,” and expressed that they were “hopelessly
16 deadlocked” after three days of deliberation prior to reaching their verdict. Id.
17 Meanwhile, Petitioner’s jury also engaged in lengthy deliberations spanning several
18 court days. On the first day, the jurors requested and heard read back of witness
19 testimony, while during deliberations on the second day, the jurors inquired about
20 whether Petitioner had previously been incarcerated. During the third day of
21 deliberations, the jury sent a note indicating that: “At this point, the jury has not been
22 able to reach a unanimous decision. We are requesting the court’s assistance in this
23 matter.” (RT 6595.) Upon the trial court’s inquiry, the jury requested Petitioner’s
24 resume, from the guilt phase evidence, as well as a read back of both Dr. Cermak and Dr.
25 Bucky’s penalty phase testimony. (RT 6601, 6603.) On the fourth day of deliberations,
26 the jury again expressed an inability to reach a verdict, this time sending a note stating:
27 “The jury has explored every possibility in this trial and cannot reach a unanimous
28 decision.” (RT 6623.) Without inquiring as to the numerical division, the trial court

1 gave the jurors a lengthy supplemental instruction²⁰ that included a review of the law and
2 comments on the penalty phase evidence. (RT 6638-39, 6652-58.) Even then, the jurors
3 appeared to have had continued difficulty arriving at a decision, as they deliberated for
4 two additional court days prior to reaching a verdict.

5 Petitioner's penalty phase jury was also presented with significant evidence in
6 mitigation, including testimony about his mother's alcoholism throughout her pregnancy
7 and his childhood, her prostitution, neglect of Petitioner, that Petitioner was abused by
8 his stepfather, and Petitioner's own early use and abuse of alcohol and drugs.
9 Petitioner's birth was the result of his mother's liaison with another man that broke up
10 her marriage and led her to resent Petitioner. Petitioner never knew his father and was
11 fathered outside of his mother's marriage, which led to the break-up of that marriage and
12 her resentfulness and maltreatment of Petitioner. The jury heard evidence that Petitioner
13 struggled with substance abuse throughout his life, starting at an extremely early age.
14 Dr. Cermak testified at length about Petitioner's background and upbringing, substance
15 abuse, organic brain damage, blackouts, and the possibility of fetal alcohol effects from
16 his mother's alcohol abuse. While the murder and prior crimes were certainly
17 aggravating, trial counsel persuasively argued that Petitioner's prior crimes were all
18 connected to his drug and alcohol abuse and should be considered in mitigation. The
19 jury also heard evidence that Petitioner was falling-down drunk on the evening of the
20 murder, and were aware that a fingerprint from the scene made in a reddish substance
21 that could have been blood did not match Petitioner's.

22 As discussed above, a death verdict was far from a foregone conclusion in this
23 case, and in light of the entirety of the record and the highly improper and impassioned
24 argument by the prosecutor, quoting from the Bible in support of the death penalty and
25 drawing parallels between biblical law and the state penal code to argue in favor of a
26

27 ²⁰ Petitioner has alleged several claims of error arising from aspects of the trial
28 court's supplemental instructions to the jury, which are addressed in Claims 21, 22 and
24, infra.

1 death verdict, the Court finds it impossible to conclude that the misconduct was
 2 harmless. “[I]f one cannot say, with fair assurance, after pondering all that happened
 3 without stripping the erroneous action from the whole, that the judgment was not
 4 substantially swayed by the error, it is impossible to conclude that substantial rights were
 5 not affected.” O’Neal v. McAninch, 513 U.S. 432, 437-38 (1995), quoting Kotteakos
 6 v. United States, 328 U.S. 750, 764-65 (1946).

7 This Court is mindful of the Supreme Court’s caution that it “should not lightly
 8 infer that a prosecutor intends an ambiguous remark to have its most damaging meaning
 9 or that a jury, sitting through lengthy exhortation, will draw that meaning from the
 10 plethora of less-damaging interpretations.” Donnelly, 416 U.S. at 647. However, there
 11 is no ambiguity to the remarks at issue in this case. The misconduct was deliberate,
 12 substantial, and perfectly timed with crescendo effect at the close of argument.²¹ The
 13 content of the offending comments was also highly suggestive of preparation
 14 beforehand, rather than the result of extemporaneous rhetoric in the moment, given that
 15 the remarks contained an extended and nearly verbatim quotation from biblical text
 16 specifically commanding the death penalty as a punishment for murder. Not only did the
 17 prosecutor press the jurors to find support for the death penalty in the Bible, he quite
 18 literally conferred equal standing upon the Bible as a source of relevant authority. By
 19 so willfully and artfully juxtaposing the Bible (“another book”) with what should have

21 ²¹ The record amply reflects the prosecutor’s knowledge of, and sensitivity to, the
 22 rules of evidence, further supporting the conclusion that the prosecutor intentionally
 23 engaged in the misconduct. Mere minutes after the prosecutor offered egregiously
 24 improper argument, he promptly and repeatedly objected to defense counsel’s own
 25 closing argument, contesting remarks which most would perceive as innocuous. (RT
 26 6471-72, 6476, 6489-90.) Two of those objections were overruled, while one was
 27 sustained on “narrow grounds.” (*Id.*) It is evident that the prosecutor was well aware
 28 of the proper bounds of argument, given his eagerness to object to comments he believed
 were inappropriate. That the prosecutor, clearly aware of the rules of evidence,
 intentionally engaged in such inflammatory and condemnable conduct is deeply
 troubling to the Court. See Connick v. Thompson, 563 U.S. 51, ___, 131 S.Ct. 1350,
 1365 (2011) (“It is as much (a prosecutor’s) duty to refrain from improper methods
 calculated to produce a wrongful conviction as it is to use every legitimate means to
 bring about a just one.”), quoting Berger v. United States, 295 U.S. 78, 88 (1935).

1 been the exclusive guiding principles of the Penal Code and jury instructions, the
2 prosecutor struck a foul blow, ignoring the admonition that government's interest in a
3 prosecution is that justice shall be done, and that while a prosecutor "may strike hard
4 blows, he is not at liberty to strike foul ones." Berger, 295 U.S. at 88. It is equally
5 apparent that the misconduct had its intended impact. The prosecutor's assurances to the
6 jury that authority no less than Scripture demanded a death verdict was aimed at
7 controlling the outcome of the penalty phase in his favor and "sought to give the jury a
8 view of its role in the capital sentencing procedure that was fundamentally incompatible
9 with the Eighth Amendment's heightened 'need for reliability in the determination that
10 death is the appropriate punishment in a specific case.'" Caldwell, 472 U.S. at 340,
11 quoting Woodson, 428 U.S. at 305.

12 As discussed above, the California Supreme Court correctly found that the
13 prosecutor's religious argument was misconduct and fell outside the bounds of both state
14 and federal law, but unreasonably found that the comments were not prejudicial. There
15 was no objection to the remarks in question, and the trial court failed to provide an
16 instruction aimed at ameliorating the impact of this misconduct. While there was
17 significant evidence in aggravation, the record also reflects that the defense presented
18 substantial mitigating evidence, and that the jury undoubtedly struggled with the penalty
19 decision over numerous days of deliberation. Based on a review of the entire trial
20 record, the Court cannot conclude that the misconduct was harmless.

21 Because the Court has "grave doubt" about whether the misconduct in question
22 impacted the jury's death penalty decision in his case, the Court resolves this claim in
23 favor of Petitioner. See O'Neal, 513 U.S. at 438 ("[I]f a judge has 'grave doubt' about
24 whether an error affected a jury in this way, the judge must treat the error as if it did
25 so."); see also Ayala, 135 S.Ct. at 2197-98 (pursuant to Brecht, "relief is proper only if
26 the federal court has 'grave doubt about whether a trial error of federal law had
27 substantial and injurious effect or influence in determining the jury's verdict.'") (internal
28 quotation marks omitted), quoting O'Neal, 513 U.S. at 436. Petitioner is entitled to

1 habeas relief on Claim 12.

2 **3. Claim 13**

3 In this claim, Petitioner contends that his constitutional right to due process and
4 a reliable penalty determination were violated “as a result of the erroneous statement by
5 the prosecutor during the penalty phase closing argument that if the aggravating factors
6 outweigh the factors in mitigation, the jury must impose a sentence of death and should
7 only recommend a sentence of life without parole if the mitigating factors outweigh the
8 aggravating ones.” (FAP at 296.)

9 Petitioner raised this contention as Claim 6 in the state habeas petition.
10 (Lodgment No. 133.) The California Supreme Court rejected the claim on the merits and
11 also denied it on procedural grounds with a citation to Dixon, 41 Cal. 2d at 759.
12 (Lodgment No. 144.) As discussed above in section III.A.1., Respondent has not carried
13 the burden of showing that Dixon precludes the Court’s review of Claim 13 on the
14 merits.

15 During the penalty phase closing argument, the prosecutor made the following
16 remarks:

17 If you find, and your burden - - this is the jury’s job during the penalty
18 phase. If you decide that the penalty, that the aggravating circumstances
19 outweigh the mitigating circumstances, then you vote for death. If the
20 mitigating circumstances outweigh the aggravating circumstances, then you
21 vote for life without the possibility of parole. That is the weighing process
22 that you engage in back there.

23 (RT 6390.)

24 In contrast to Claim 12 above, Petitioner fails to persuasively explain how the
25 prosecutor’s weighing comments “so infected the trial with unfairness as to make the
26 resulting conviction a denial of due process.” Darden, 477 U.S. at 181, quoting
27 Donnelly, 416 U.S. at 643. Again, the Court must review these statements “in the
28 context of the entire trial.” Id. at 639. Even if the Court were to assume, without
deciding, that the prosecutor’s argument constituted an erroneous statement of the law,
the trial judge specifically directed the jury that they must follow the law as provided by
the court, as follows: “You must determine what the facts are from the evidence received

1 during the entire trial, unless you are instructed otherwise. You must accept and follow
2 the law that I shall state to you.” (RT 6333.) At both the outset of the penalty phase
3 proceedings and again at the conclusion of the attorneys’ arguments in closing, the trial
4 court gave the jurors detailed instructions on the law as it pertained to the weighing of
5 the evidence in aggravation and mitigation, stating that:

6 After having heard all of the evidence, and after having heard and
7 considered the arguments of counsel, you shall consider, take into account
8 and be guided by the applicable factors of aggravating and mitigating
circumstances upon which you have been instructed.

9 The weighing of aggravating and mitigating circumstances does not
10 mean a mere mechanical counting of factors on each side of an imaginary
11 scale, or the arbitrary assignment of weights to any of them. You the jury
12 are free to assign whatever moral or sympathetic value you deem
13 appropriate to each and all of the various factors you are permitted to
14 consider. In weighing the various circumstances you determine under the
relevant evidence which penalty is justified and appropriate by considering
the totality of the aggravating circumstances with the totality of the
mitigating circumstances. To return a judgment of death, each of you must
be persuaded that the aggravating circumstances are so substantial in
comparison with the mitigating circumstances that it warrants death instead
of life without parole.

15 (CT 2051; see RT 5308, 6551.) Similar to Claim 12, defense counsel did not object to
16 the remarks nor was a specific curative instruction given to target the asserted error.
17 However, in this instance, unlike in the prior claim, the trial court’s instructions to the
18 jury were detailed in instructing the jurors on the weighing of the evidence and clearly
19 ameliorated the prosecutor’s arguably erroneous argument.

20 The trial judge also generally cautioned the jurors that: “Statements by the
21 attorneys during the trial are not evidence.” (RT 6336-37; see also RT 6341, 6383.) As
22 previously noted, a jury is presumed to understand and follow the trial court’s
23 instructions. Weeks, 528 U.S. at 234; Marsh, 481 U.S. at 211. Even were the Court to
24 presume that the prosecutor’s argument was misconduct, in light of the trial judge’s
25 specific and repeated instructions outlining the applicable law and admonishing that the
26 statements of counsel were not evidence, Petitioner fails to show that the prosecutor’s
27 weighing argument had a “substantial and injurious effect or influence in determining
28 the jury’s verdict.” Brecht, 507 U.S. at 637; see also Wood v. Ryan, 693 F.3d 1104,

1 1113 (9th Cir. 2012) (“On habeas review, constitutional errors of the ‘trial type,’
 2 including prosecutorial misconduct, warrant relief only if they ‘had substantial and
 3 injurious effect or influence in determining the jury’s verdict.’”), quoting Brecht, 507
 4 U.S. at 637. The California Supreme Court’s rejection of this claim was neither contrary
 5 to, nor an unreasonable application of, clearly established federal law. Petitioner does
 6 not merit habeas relief on Claim 13.

7 **C. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS**

8 Pursuant to the standard set forth in Strickland, “a defendant must show both
 9 deficient performance and prejudice in order to prove that he has received ineffective
 10 assistance of counsel.” Knowles v. Mirzayance, 556 U.S. 111, 122 (2009), citing
 11 Strickland, 466 U.S. at 687. “Surmounting Strickland’s high bar is never an easy task.”
 12 Padilla v. Kentucky, 559 U.S. 356, 371 (2010).

13 “When a convicted defendant complains of the ineffectiveness of counsel’s
 14 assistance, the defendant must show that counsel’s representation fell below an objective
 15 standard of reasonableness.” Strickland, 466 U.S. at 687-88. “[A] court must indulge
 16 a strong presumption that counsel’s conduct falls within the wide range of reasonable
 17 professional assistance; that is, the defendant must overcome the presumption that, under
 18 the circumstances, the challenged action ‘might be considered sound trial strategy.’” Id.
 19 at 689 (“Judicial scrutiny of counsel’s performance must be highly deferential.”)

20 To establish prejudice, the petitioner must demonstrate that “there is a reasonable
 21 probability that, but for counsel’s unprofessional errors, the result of the proceeding
 22 would have been different.” Id. at 694. “A reasonable probability is a probability
 23 sufficient to undermine confidence in the outcome.” Id.; see also id. at 691 (“An error
 24 by counsel, even if professionally unreasonable, does not warrant setting aside the
 25 judgment of a criminal proceeding if the error had no effect on the judgment.”) “The
 26 likelihood of a different result must be substantial, not just conceivable.” Richter, 562
 27 U.S. at 112.

28 With respect to the penalty phase, “[i]n assessing prejudice, we reweigh the

evidence in aggravation against the totality of the available mitigating evidence.” Wiggins v. Smith, 539 U.S. 510, 534 (2003); Williams, 529 U.S. at 397-98 (the court must “evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding – in reweighing it against the evidence in aggravation.”); Wong v. Belmontes, 558 U.S. 15, 26 (2009) (per curiam) (“[T]he reviewing court must consider all the evidence-the good and the bad-when evaluating prejudice.”), citing Strickland, 466 U.S. at 695-96.

Moreover, when a federal habeas court is reviewing a claim of ineffective assistance of counsel previously adjudicated on the merits by a state court:

The pivotal question is whether the state court’s application of the Strickland standard was unreasonable. This is different from asking whether defense counsel’s performance fell below Strickland’s standard. Were that the inquiry, the analysis would be no different than if, for example, this Court were adjudicating a Strickland claim on direct review of a criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise that the two questions are different. For purposes of § 2254(d)(1), “an unreasonable application of federal law is different from an incorrect application of federal law.” Williams, *supra*, at 410, 120 S.Ct. 1495. A state court must be granted a deference and latitude that are not in operation when the case involves review under the Strickland standard itself.

Richter, 562 U.S. at 101.

As noted above, these claims were denied on the merits by the California Supreme Court without a statement of reasoning, and Petitioner asserts that the adjudication of Claims 4-8 are “not entitled to deference because there was a complete breakdown in the state habeas corpus procedure as a result of the destruction of the trial files by former habeas counsel,” and that de novo review is instead appropriate. (FAP at 139.) Petitioner contends that “the lack of a complete or even cohesive trial record makes it impossible to determine which facts could have been presented by current habeas counsel or considered by the California Supreme Court in its ‘postcard’ denial on the merits.” (*Id.*) Petitioner asserts that:

The summary denial of these claims on the merits by the California Supreme Court prior to a hearing and without the means to fully examine these issues on a record the California Supreme Court knew was incomplete, denied Mr. Roybal Due Process under the Fourteenth Amendment to the United States Constitution. *Hicks v. Oklahoma*, *supra*,

1 447 U.S. at 346; *Gardner v. Florida*, 430 U.S. 349, 362 (1977); *Dobbs v.*
 2 *Zant*, 506 U.S. 357, 362 (1993). That denial of Due Process resulted in a
 3 “objectively unreasonable” standard of review and, as argued in the first
 4 claim in this petition, requires this Court’s *de novo* review. *Taylor v.*
Maddox, *supra*, 366 F.3d at 999.

5 (FAP at 197.) Petitioner also argues that review under Richter is inappropriate, as the
 6 state court’s process “was constitutionally flawed, so this Court cannot determine if the
 7 decision of the California Supreme Court was reasonable because it was based upon a
 8 record that was incomplete, and to speculate whether there are reasons supporting the
 9 denial of the state habeas corpus petition would perpetuate that same due process
 10 violation.”²² (*Id.* at 198.)

11 Essentially, Petitioner contends that the California Supreme Court’s failure to hold
 12 a hearing, issue an order to show cause, or allow for other factual development was
 13 unreasonable under section 2254(d), as, given the state of trial counsels’ files, this would
 14 have been the only avenue to properly adjudicate Petitioner’s claims, which were based
 15 on facts outside the record. Thus, Petitioner asserts that this Court should proceed

17 ²² In the Traverse, Petitioner separately asserts that the rebuttable presumption that
 18 the California Supreme Court denied these claims on the merits has been satisfied, as
 19 “[t]he silent denial of these claims, where there was not an adequate record to review,
 20 and no effort to remedy that destruction, effectively rebuts that the denial of those claims
 21 were on the merits.” (Traverse at 31.) In Richter, the Supreme Court stated that “[w]hen
 22 a federal claim has been presented to a state court and the state court has denied relief,
 23 it may be presumed that the state court adjudicated the claim on the merits in the absence
 24 of any indication or state-law procedural principles to the contrary.” Richter, 562 U.S.
 25 at 99. However, the California Supreme Court clearly rejected these ineffective
 26 assistance of counsel claims on the merits in an order which stated in relevant part: “All
 27 remaining claims are denied on the merits,” (see Lodgment No. 144), and the rebuttable
 28 presumption is therefore not applicable to this situation. Johnson v. Williams, 568 U.S.
 133 S.Ct. 1088, 1096 (2013) (“When a state court rejected a federal claim without
 expressly addressing that claim, a federal habeas court must presume that the federal
 claim was adjudicated on the merits—but that presumption can in some limited
 circumstances be rebutted.”) Indeed, the Supreme Court has specifically stated that
 “[s]ection 2254(d) applies even where there has been a summary denial.” Pinholster, 131
 S.Ct. at 1402, citing Richter, 562 U.S. at 101-02. There is no indication here that the
 California Supreme Court overlooked or ignored any of Petitioner’s claims; Petitioner
 contends instead that the state court’s review of his ineffective assistance claims was
 inadequate or unreasonable because that court did not allow for factual development,
 which is a separate argument. Petitioner fails to rebut the presumption that the California
 Supreme Court’s denial of these claims was on the merits.

1 directly to a de novo review in light of the California Supreme Court's silent denial of
 2 these claims without allowing for factual development. However, the Ninth Circuit has
 3 declined to require that the state court hold a hearing or order additional factual
 4 development in order to find that a claim was adjudicated on the merits, and was
 5 therefore entitled to deference under AEDPA. See Lambert v. Blodgett, 393 F.3d 943,
 6 965-66 (9th Cir. 2004) ("We decline to hold that AEDPA's reference to 'adjudicated on
 7 the merits' authorizes us to review the form or sufficiency of the proceedings conducted
 8 by the state court. Thus, we will not read into 'adjudicated on the merits' a requirement
 9 that the state have conducted an evidentiary hearing, or indeed, any particular kind of
 10 hearing.") As such, the denial of these claims on the record presented to the California
 11 Supreme Court does not persuade the Court that that decision was objectively
 12 unreasonable, based solely on the state of trial counsels' files.

13 The record before the Court contains numerous documents regarding counsels'
 14 efforts in investigation and preparation for trial. Current habeas counsel has made
 15 extensive efforts to reconstruct trial counsels' files, assisted by state and federal court
 16 funding, and the cooperation of other individuals and entities. (See Exs. 33, 62,
 17 Lodgment Nos. 138, 142.) While Petitioner contends that the files remain incomplete,
 18 it is clear that numerous records have been recovered or reconstructed and are available
 19 for review.²³ For instance, the trial record (both the Reporter's and Clerk's Transcripts),
 20

21 ²³ Habeas counsel contend that despite their due diligence, they have been unable
 22 to complete record reconstruction. (Ex. 62, Lodgment No. 142 at 39.) It appears that
 23 some of the materials Petitioner cites as missing have been the subject of reconstruction
 24 efforts. For instance, counsel noted that despite their efforts, they were unable to contact
 25 or recover any substantive material concerning Dr. Swenson, a neurologist who had been
 26 retained in advance of trial, as the only records concerning him noted that he was paid
 27 \$600 for his work and stated that: "Report of Dr. Swenson (6/1/92), Describes [sic] head
 28 injuries; says no brain damage." (Ex. 33, Lodgment No. 138 at 1179-80.) However,
 counsel acknowledge that "[t]he federal court authorized funding to reconstruct testing
 and analysis of some of the experts whose data has been lost." (*Id.* at 1180.) Both Dr.
 Wegman and Dr. Victoroff reviewed relevant materials, evaluated Petitioner, and
 submitted declarations in support of the post-conviction proceedings. Counsel states that
 "[t]he majority of experts who had been retained by trial counsel either never responded
 to my letters and phone calls or could not be located," but does not indicate how many
 experts were retained. (*Id.* at 1179.) Of the three experts that were specifically
 mentioned, Drs. Cermak, Koshkarian, and Friedman, Petitioner has submitted a

1 appellate, and post-conviction proceedings are intact and included in the record before
 2 the Court. (See Lodgment Nos. 1-144.) Petitioner has also provided numerous
 3 declarations from individuals who testified at trial, as well as several declarations from
 4 individuals who did not testify, and the state habeas petition was accompanied by
 5 numerous medical records, social history information, correctional records, and other
 6 documents, which has also been presented to this Court. (See Lodgment Nos. 134-39,
 7 142.) Moreover, Petitioner attached declarations from both trial counsel, discussing their
 8 investigation and trial preparation in the context of the habeas claims. (See Lodgment
 9 No. 143.) The district attorney's office provided a copy of the trial discovery, including
 10 both the discovery the prosecution had previously provided to the trial defense, as well
 11 as the discovery the defense had provided to the prosecution. (See Ex. 59, Lodgment
 12 No. 139 at 1558.) After discovery proceedings, the state superior court held that the
 13 prosecutor's office had complied with the order granting Petitioner's discovery request.
 14 (See Ex. 64, Lodgment No. 142 at 121.) All of these materials were part of the record

16 declaration or report from each of those experts in support of the habeas petition.

17 Counsel also indicate that they sent releases to all penal institutions, rehabilitation
 18 centers and other programs, but several facilities never responded and others indicated
 19 they no longer had records. (Id. at 1181.) However, records from numerous facilities
 20 are available and have been included in support of the petition, from Seadrunar, RAP,
 21 and Rio Grande ATC, three substance abuse recovery programs, as well as records from
 22 the Santa Fe Sheriff's Department, Western New Mexico Correctional Facility, Las
 23 Lunas (Central New Mexico Correctional Facility), San Diego County Sheriff's
 24 Department, and New Mexico Correctional Department. (See Exs. 20, 23, 25-30,
 25 Lodgment Nos. 135-38.)

26 Counsel also note that "[a]n example of documents that are no longer in the case
 27 file are copies of the actual documents sent to Dr. Timmen Cermak by trial counsel for
 28 Mr. Roybal. Dr. Cermak, as he states in his declaration attached to the informal reply,
 no longer has these documents. Because there is no file containing copies of documents
 of documents [sic] actually sent to Dr. Cermak, we are unable to determine exactly what
 documents he was given to review in advance of his evaluation of Mr. Roybal and his
 testimony during the penalty phase." (Ex. 62, Lodgment No. 142 at 38.) Dr. Cermak
 provided a post-conviction declaration which contained a list of the materials he
 reviewed in preparation for his 1992 interview of Petitioner and trial testimony. (See Ex.
 60, Lodgment No. 142 at 3-4.) At trial, the parties also discussed providing Dr. Bucky,
 the prosecution's rebuttal witness, with the same materials provided to Cermak,
 including witness interviews and Dr. Friedman's report. (RT 5241A-42A, 5254A-56A.)
 Finally, at the outset of his trial testimony, Dr. Cermak also specifically listed the
 materials he reviewed prior to evaluating Petitioner. (RT 6064-65.) Therefore, it
 appears that the documents Dr. Cermak reviewed are mentioned at several points in the
 record.

1 presented to the California Supreme Court.

2 In light of the available materials, Petitioner fails to demonstrate that the
3 California Supreme Court's adjudication of these claims on the present record without
4 factual development, based on the state of trial counsels' files, was inadequate, violated
5 his right to due process, or warrants *de novo* review. In any event, as discussed below,
6 because Claims 4-8 fail under even a *de novo* review, Petitioner is not entitled to habeas
7 relief under the appropriately deferential standard of review. See Berghuis v.
8 Thompkins, 560 U.S. 370, 390 (2010) ("Courts cannot grant writs of habeas corpus
9 under § 2254 by engaging only in *de novo* review when it is unclear whether AEDPA
10 deference applies, § 2254(d). In those situations, courts must resolve whether AEDPA
11 deference applies, because if it does, a habeas petition may not be entitled to a writ of
12 habeas corpus under § 2254(d). Courts can, however, deny writs of habeas corpus under
13 § 2254 by engaging in *de novo* review when it is unclear whether AEDPA deference
14 applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his
15 or her claim is rejected on *de novo* review, see § 2254(a).") In an abundance of caution,
16 in the course of adjudicating each of these claims, the Court has conducted a *de novo*
17 review, as well as evaluated whether the California Supreme Court's denial of his
18 allegations without a hearing or other factual development was itself objectively
19 unreasonable under either § 2254 (d)(1) or (d)(2).

20 **1. Claim 4 - Ineffective Assistance of Counsel- Failure to Investigate and**
21 **Present Evidence to Rebut Flight and Consciousness of Guilt**

22 Petitioner contends that trial counsel rendered prejudicially deficient performance
23 in failing to investigate and present evidence to rebut the prosecution's argument about
24 Petitioner's consciousness of guilt in leaving Oceanside the day after the victim's murder
25 and regarding a jury instruction on flight. (FAP at 200-01.)

26 Petitioner raised this contention as part of Claim 1 in the state habeas petition.
27 (Lodgment No. 133.) The California Supreme Court rejected the claim on the merits
28 without a statement of reasoning. (Lodgment No. 144.)

1 Petitioner argues that “during the guilt phase, the jury learned that on June 14,
2 1989, two detectives from the Oceanside Police Department interviewed Petitioner in
3 Santa Fe while he was in custody on a warrant from New Mexico- a warrant having
4 nothing to do with the Weden homicide.” (FAP at 204) (citations omitted.) Petitioner
5 asserts that there was available evidence that he was in custody in New Mexico when he
6 was interviewed about the victim’s murder in 1989, and that he was being held at a
7 minimum security facility when he spoke to District Attorney’s office investigator Jensen
8 in 1991, all prior to being brought to California. He argues that trial counsel was
9 ineffective for failing to present evidence that Petitioner did not make any attempt to
10 escape from the minimum security facility, as such evidence “would not only have
11 rebutted the consciousness of guilt and shown an excellent institutional record, but
12 provided additional evidence in support of [sic] mental health defense, in both the guilt
13 and penalty phases, by showing by Mr. Roybal’s actions that he did not remember what
14 had happened.” (Id. at 205.)

15 Petitioner argues that this evidence “would have given independent corroboration
16 to the testimony at trial of the [sic] Frank Orozco, Mr. Roybal’s older adopted brother,
17 that Mr. Roybal had previously indicated his desire to return to Santa Fe” and “would
18 also have corroborated the testimony of Mary Lou Orozco, Frank’s wife, who testified
19 on cross-examination as a witness for the prosecution that Mr. Roybal had been saying
20 since he arrived at their house that he wanted to return to New Mexico.” (Id. at 203-04.)
21 Petitioner also asserts that “it would have complemented the neurological evidence that
22 was never presented that Mr. Roybal had been suffering from alcoholic blackouts for
23 years” and that both Frank and Mary Orozco testified that Petitioner was “falling down
24 drunk” on the night of the crime. (Id.)

25 Petitioner argues that trial counsel was aware of the impact of the evidence of
26 flight, as counsel opposed the jury instruction on flight. (Id. at 203.) The record reflects
27 that counsel objected to the instruction and in the alternative requested modification to
28 use the word “departure” instead of “flight”; the objection was overruled and

1 modification denied. (RT 4698-4701.) The trial court later added a sentence to the
2 instruction without objection by either counsel, preserving the earlier objections for the
3 record, and the instruction given to the jury was as follows:

4 The flight of a person immediately after the commission of a crime is not
5 sufficient in itself to establish his guilt, but is a fact which, if proved, may
6 be considered by you in the light of all other proved facts in deciding the
7 question of his guilt or innocence. If there was such flight, the weight
8 which such circumstance is entitled is a matter for the jury to determine.

9 (RT 4852-53.) The prosecution argued at both the guilt and penalty phases that
10 Petitioner leaving Oceanside for New Mexico the day after the murder demonstrated his
11 consciousness of guilt. (RT 4909-12, 6461-62.)

12 Both trial counsel have submitted declarations in support of the habeas petition,
13 stating that they knew Petitioner had been housed in a minimum security facility prior
14 to his extradition to California and that Petitioner was aware of the extradition efforts
15 taking place to bring him to California to face murder charges. (Exs. 66, 67, Lodgment
16 No. 143 at 2, 10.) Both counsel acknowledge that they did not “present[] evidence that
17 he did not try to escape a minimum security ‘walk away’ facility in New Mexico,” and
18 neither recalled a strategic or tactical reason for not doing so. (*Id.* at 2, 10-11.)

19 Even assuming that counsels’ inability to recall a tactical or strategic reason for
20 failing to present this evidence could support a finding of deficient performance, this
21 claim is without merit because Petitioner has not demonstrated prejudice. It is clear that
22 the jurors were instructed that the evidence that Petitioner left Oceanside the day after
23 the murder was “not sufficient in itself to establish his guilt,” but could only be
24 considered in light of the other evidence. Petitioner’s brother and sister-in-law testified
25 that Petitioner planned to return to New Mexico prior to the murder, but that evidence
26 was contested. Petitioner’s mother testified that she was surprised when Petitioner
27 arrived from New Mexico in early June, as she was expecting him home sometime that
28 month, but not that day; she received a call from him that day when he was at the bus
station and he arrived at her home about thirty to forty-five minutes later. (RT 3252-53,
3260.)

1 Other trial evidence also supported Petitioner's consciousness of guilt. For
2 instance, when Petitioner spoke to the police in New Mexico, he did not mention that he
3 had even been in Oceanside, or in California at all, telling them that he had spent the
4 prior few months in Seattle and that he had returned to New Mexico to visit his mother,
5 who was ill and was going to have surgery. (RT 3361-62.) Petitioner's mother testified
6 that she saw Petitioner hide some items in a wall in the backyard of her home; a police
7 search recovered jewelry belonging to the victim and her husband which had been kept
8 in the victim's home. (RT 3261-67, 3271-80 (Stella Roybal testimony); 2649-56 (police
9 search); 2830-45 (missing jewelry and prior location).) In addition to the prosecutor's
10 argument about Petitioner's flight from California to New Mexico, the prosecutor also
11 argued in closing that each of these factors further evidenced Petitioner's consciousness
12 of guilt. (See RT 4911-14, 6461-63.) Even if the defense apprised the jury that
13 Petitioner did not attempt to escape from minimum security custody in New Mexico, to
14 the extent that could have arguably rebutted the evidence that Petitioner fled California
15 the day after the murder, the evidence still supported Petitioner's consciousness of guilt.

16 Meanwhile, the other circumstantial evidence against Petitioner was strong.
17 Petitioner had recently worked for the victim at her home, and was therefore aware of
18 her advanced age and that her husband worked nights. Numerous items of jewelry
19 belonging to the victim and her husband were found hidden in the backyard area of his
20 mother's home. Petitioner smoked the same brand of cigarettes, Camel, as a cigarette
21 found on the floor of the victim's home; the victim did not smoke and her husband
22 smoked a different brand. There was blood and DNA on Petitioner's knife and sock
23 which was consistent with both himself and the victim, while saliva from the cigarette
24 was also consistent with both individuals. Fibers similar to those on the victim's
25 pajamas were found on clothing belonging to Petitioner.

26 Nor is the Court persuaded that evidence of a lack of escape attempt would have
27 been persuasive in supporting a possible defense theory that Petitioner blacked out on
28 the evening of the murder. Petitioner asserts that such evidence would have also

1 “provided additional evidence in support of [sic] mental health defense, in both the guilt
2 and penalty phases, by showing by Mr. Roybal’s actions that he did not remember what
3 had happened.” (FAP at 205.) A failure to attempt an escape from a minimum security
4 facility weeks or years after the murder could conceivably allow the defense to argue that
5 Petitioner did not recall the murder. But this argument would have been of slight value,
6 given the other evidence showing Petitioner’s awareness of the situation, including
7 failing to tell the police that he had been in California and mentioning only Seattle, his
8 possession of jewelry from the victim’s home, and his efforts to hide that jewelry.

9 In light of the other evidence that buttressed Petitioner’s consciousness of guilt,
10 the clear instruction to the jury on how to consider the evidence of flight, and the other
11 evidence introduced at trial, Petitioner fails to demonstrate that “there is a reasonable
12 probability that, but for counsel’s unprofessional errors, the result of the proceeding
13 would have been different.” Strickland, 466 U.S. at 694. Thus, even under a de novo
14 review, this claim does not merit habeas relief. To the extent this proposed evidence
15 could have impacted the jury’s weighing of mitigation and aggravation, the claim fails
16 for lack of prejudice as discussed in section C.5, below. Petitioner is not entitled to
17 habeas relief on Claim 4.

18 **2. Claims 5 and 6**

19 In Claim 5, Petitioner contends that trial counsel rendered prejudicially deficient
20 performance at the guilt phase of trial in failing to adequately investigate and present
21 evidence regarding Petitioner’s organic brain damage. (FAP at 206.) Specifically,
22 Petitioner contends that counsel failed to obtain records showing that Petitioner had
23 suffered a number of head injuries and failed to obtain adequate testing prior to deciding
24 against a mental health defense at the guilt phase. (Id. at 209-10, 218-20.) In Claim 6,
25 Petitioner contends that trial counsel rendered prejudicially deficient performance at the
26 penalty phase of trial in failing to adequately investigate and present evidence regarding
27 Petitioner’s organic brain damage. (Id. at 224.) While Dr. Timmen Cermak testified at
28 the penalty phase about Petitioner’s mental health and brain deficiencies, Petitioner

1 contends that counsel did not provide the expert with adequate information about
 2 Petitioner's medical and social history, failed to obtain adequate testing of Petitioner, and
 3 did not allow Dr. Cermak sufficient time to prepare. (Id. at 225-38.)

4 Petitioner raised these contentions as part of Claim 1 in the state habeas petition.
 5 (Lodgment No. 133.) The California Supreme Court rejected that claim on the merits
 6 without a statement of reasoning. (Lodgment No. 144.)

7 **A. Trial Counsels' Investigation and Presentation of Organic Brain** 8 **Damage**

9 The record reflects, and Petitioner acknowledges, that during the pre-trial
 10 investigation, trial counsel obtained records from the Rio Grande Alcohol Treatment
 11 Center, Las Vegas Medical Center, Seadrunar, Western New Mexico Correctional
 12 Facility and the Las Lunas Correctional Facility. (FAP at 206-07, citing Exs. 20, 24, 26,
 13 28, 29, Lodgment Nos. 135-137.) Of these, Petitioner states that only the records of the
 14 Las Vegas Medical Center "mentions or discusses brain damage," which is limited to a
 15 June 10, 1982 psychiatric admission form that Petitioner showed "no head injuries or
 16 trauma," and a notation dated May 23, 1983 that Petitioner had previously suffered a
 17 prior "mild cerebral concussion." (FAP at 207, citing Ex. 24, Lodgment No. 136 at 558.)
 18 The Court's review of these records reveals several other notable references. For
 19 instance, in a 1986 Rio Grande Alcohol Treatment Center record, Petitioner
 20 acknowledged having "hallucinations" and "plenty of blackouts" due to drinking, and
 21 "may have had one seizure, is not sure." (Ex. 20, Lodgment No. 135 at 297.) Petitioner
 22 also reported that he "was in the hospital for a week as he was hit by a car," and "[h]as
 23 been hospitalized many times when he goes into DT or been in fights." (Id. at 298.) A
 24 June 11, 1983, New Mexico State Hospital discharge summary also included the
 25 following note: "On 5-5-83, he was taken to St. Vincent's Hospital due to a mild cerebral
 26 concussion from having been hit over the head with a crowbar." (Id. at 566.) Finally,
 27 a July 1, 1986 Sixty-Day Diagnostic Evaluation at the Western New Mexico Correctional
 28 Facility indicated that Petitioner "reported one past suicide attempt in which, while

1 intoxicated, he walked in front of a moving car,” and that he “sustained a fractured arm
2 in this attempt which occurred in 1984.” (Ex. 28, Lodgment No. 137 at 901.)

3 The record also reflects that trial counsel retained several mental health
4 professionals, including but not limited to, psychologist Meredith Friedman, Dr. Haig
5 Koshkarian, and Dr. Timmen Cermak, for testing and evaluation.²⁴ The defense retained
6 clinical psychologist Meredith Friedman, Ph.D., who evaluated Petitioner on three
7 occasions in February, March and April 1992, administered a number of tests, and
8 submitted a report to counsel dated May 1, 1992. (Ex. 12, Lodgment No. 134 at 125.)
9 Dr. Friedman discussed Petitioner’s background, her own observations of his behavior
10 and his functioning, including his history of drug and alcohol use and poor educational
11 performance. (Id. at 125-26.) Dr. Friedman stated that Petitioner was “a soft-spoken
12 individual who was extremely cooperative and pleasant” and that “he had difficulty
13 understanding questions which oftentimes had to be repeated,” but that he “provided a
14 rather vague, superficial, and poorly organized history” and “[a]t various times he
15 supplied information that differed from what he had told me in a previous meeting.” (Id.
16 at 126.) She noted that his “thinking was logical and goal-directed.” (Id.)

17
18 ²⁴ The state record also reflects that several other medical professionals were
19 consulted in preparation for trial. For instance, the state record reflects that trial counsel
20 consulted with Dr. Michael Swenson, a neurologist, who was retained by trial counsel
21 to evaluate Petitioner before trial. (Ex. 33, Lodgment No. 138 at 1179-80.) However,
22 current counsel’s declaration indicates only that Dr. Swenson was paid \$600, the record
does not contain the expert’s evaluation or notes, and prior appellate counsel’s notes
reflect only the following: “Report of Dr. Swenson (6/1/92), Describes [sic] head
injuries; says no brain damage.” (Id. at 1180.) Thus, this information appears to be of
use only to the extent it shows that counsel consulted with another mental health
professional in their investigation.

23 Relatedly, when the prosecution called Dr. Steven Bucky as a rebuttal witness,
24 defense counsel contested the lack of discovery by mentioning other experts they had
25 consulted, as follows: “Your honor, we had a witness, Doctor O’Halloran, who we talked
26 to, we had Richard Fox, people we didn’t call but, and did not write reports, but we were
27 ordered by this Court to reduce into written form our own notes and our interviews with
28 these experts, and we had to submit them before they would be - - before we would be
considered in compliance with discovery.” (RT 6244.) While it appears from a review
of the record that Dr. O’Halloran’s speciality was forensic science and he was consulted
in relation to the victim’s autopsy (see CT 1449-54), the Court finds no reference
identifying the reason for consulting Richard Fox. Again, given the lack of any written
reports or evaluations in the state record, this reference is relevant only to the limited
extent it shows that trial counsel consulted with another expert in preparing Petitioner’s
defense.

1 Dr. Friedman stated that one intelligence test indicated Petitioner was in the “Low
2 Average range of ability,” and that there was a “highly statistically significant”
3 difference between his language acquisition and abstract verbal reasoning, which she
4 indicated “has been associated with bilingual impoverishment, and learning disabilities.”
5 (Id.) Dr. Friedman stated that another test also indicated learning difficulties, as well as
6 low scores in reading, spelling, and arithmetic. (Id. at 126-27.) The Weschler
7 intelligence test resulted in an IQ of 83, which Dr. Friedman stated was “Low Average”
8 but again noted the differences between Petitioner’s verbal and performance IQ, which
9 “again suggests that he had noteworthy difficulty with the verbal and auditory processing
10 of information.” (Id. at 127.) Dr. Friedman performed several tests regarding organicity,
11 found that Petitioner “did significantly poorer” on one test “in a manner expected with
12 neurological involvement,” and that results of other testing “were also positive for
13 organicity.” (Id. at 127-28.) Under “Impressions,” Dr. Friedman noted “Probable
14 Attention Deficit Hyperactivity Disorder by History with accompanying problems with
15 written and oral language,” as well as “Alcohol Dependence, Severe by History” and
16 “Polysubstance Dependence, Other than Alcohol, Severe by History.” (Id. at 128.) She
17 also noted “Borderline Intellectual Functioning (I.Q. of 71 to 84).” (Id.)

18 The defense also retained psychiatrist Haig Koshkarian, M.D., who reviewed
19 reports and records including preliminary hearing testimony, a taped interview with
20 Stella Orozco, criminal history records, substance abuse treatment records and prior
21 psychological reports, evaluated Petitioner on March 3, 1992 and submitted a report to
22 counsel dated April 27, 1992. (Ex. 11, Lodgment No. 134.) Dr. Koshkarian referred to
23 a 1986 evaluation, stating that Petitioner reportedly “had an IQ score of 73, putting him
24 in the borderline range of intelligence, and it was noted that this score could be
25 indicative of a learning disability or an organic brain condition due to his long history
26 of inhalant and alcohol abuse.” (Id. at 117.) He also noted Petitioner’s repeated stints
27 in substance abuse programs, lack of success, and pending charges. (Id. at 117-18.) Dr.
28 Koshkarian conducted a three-hour interview and found Petitioner “[i]nitially wary and

1 a bit tense, as the interview progressed, he became more relaxed and outgoing.” (Id. at
2 118.) Dr. Koshkarian also noted a “withdrawn quality” to Petitioner and that he “was
3 not very expressive of feelings or emotions.” (Id.) During the interview, they discussed
4 Petitioner’s criminal history, alcohol and substance abuse, and Petitioner admitted
5 “frequent blackouts from the use of drugs and alcohol.” (Id. at 118-20.) Petitioner “had
6 been beaten up and robbed of his own money a number of times but had no memory of
7 it. Other times he would be told by others that he had done something when he was
8 drinking that he had no memory for. Usually, however, when he was told what he had
9 done he could begin to piece it together and have some vague memory of it.” (Id. at
10 120.) Petitioner also admitted that his stepfather beat him but “[h]e said that his
11 stepfather never beat him on the head but only the ‘butt.’” (Id. at 121.) Dr. Koshkarian
12 reported that: “Roybal gave no past history of seizures, problems with memory other than
13 when he was intoxicated, or any head injuries leading to brain damage.” (Id. at 122.)
14 Yet, Petitioner told Dr. Koshkarian that sometime during his twenties he “was hit with
15 a crowbar during an argument with friends and he thinks that he was briefly unconscious.
16 However, at the hospital they sutured the laceration on his forehead and determined that
17 he had no head injury.” (Id.) Petitioner also indicated that “as part of one of his suicide
18 attempts he let a car hit him when he was intoxicated,” and “he thinks he was knocked
19 out and was unconscious briefly” but stated that he “was seen at the hospital and told that
20 his head was okay.” (Id.) Dr. Koshkarian stated that Petitioner suffered from
21 polysubstance abuse and also diagnosed a “mixed personality disorder, antisocial and
22 schizoid.” (Id. at 123.)

23 The defense did not present evidence of organic brain damage during the guilt
24 phase, but instead advanced a defense of alibi and third-party culpability. Both Frank
25 and Mary Orozco testified that Petitioner was highly inebriated on the night of the
26 murder and passed out at their home.

27 Dr. Timmen Cermak testified for the defense at the penalty phase proceedings.
28 In preparation for his testimony, Dr. Cermak interviewed Petitioner and Frank Orozco,

1 listened to audio tapes of an interview with Stella Orozco, read defense investigative
2 interviews with “about ten people involved with Mr. Roybal’s life,” and reviewed the
3 Friedman and Koshkarian reports, as well as reviewed numerous correctional records,
4 treatment records, and probation and police reports. (RT 6064-65.) Dr. Cermak testified
5 that: “I found that we have a man who has significant impairment in several different
6 realms. He has significant impairment cognitively due to some brain dysfunction,” also
7 found “significant impairment in terms of his personality structure,” stated that Petitioner
8 had a “schizoid personality structure,” and noted that Petitioner was “profoundly
9 chemically dependent.” (RT 6066.) Dr. Cermak relied on Dr. Friedman’s test results,
10 particularly the wide variances between the two IQ test scores, and testified that based
11 on the test results, “it is very, very likely that what we’re dealing with is organic brain
12 damage.” (RT 6070.) Dr. Cermak also stated that, based on the test results, “it was
13 almost certainly genetic and they were not the kinds of global dementia nor the kinds of
14 frontal lobe damage that you would see predominantly from alcohol consumption.” (RT
15 6071.) Dr. Cermak discussed the possible causes of the damage, including fetal alcohol
16 effects, and that there was “some history of head trauma that, and physical abuse that he
17 sustained, but there is not enough in the records to be anything more than speculative
18 about that.” (RT 6072-76.) Dr. Cermak testified at length about Petitioner’s background
19 and history, including the neglect and rejection from his mother, physical abuse, the
20 alcoholism in the family, Petitioner’s reactions to being raised in that environment, and
21 genetic connections in alcoholism. (RT 6076-91.) Dr. Cermak also noted that blackouts
22 were “documented in multiple, multiple places” in Petitioner’s history, such as in his
23 medical records from treatment and Frank Orozco’s testimony; he also later testified that
24 Petitioner told him he used drugs the day before the crime, next recalled exiting the bus
25 in Santa Fe, and did not recall how he obtained the jewelry and made up a story; Dr.
26 Cermak stated that this account was “consistent with the behavior people have after a
27 blackout” but he had no way of knowing if it was the truth. (RT 6101, 6130-33.) Dr.
28 Cermak also stated that he did not find evidence of frontal lobe damage, only organic

1 damage. (RT 6105.) Dr. Cermak also testified extensively about Petitioner's substance
 2 abuse, his disagreement with Dr. Koshkarian's diagnosis of antisocial personality
 3 disorder, and the significance of differences between Petitioner's upbringing compared
 4 to that of his brother Frank. (RT 6106-25.)

5 **B. Information Submitted in Post-Conviction Proceedings**

6 Petitioner first contends that despite the mentions of prior head injuries in Dr.
 7 Koshkarian's report, "trial counsel did not obtain his medical records from St. Vincent
 8 Medical Center in Santa Fe, New Mexico." (FAP at 209.) Petitioner asserts that these
 9 records reflect a more extensive history of head injuries, a total of eight head injuries
 10 between 1982 and 1987, three which resulted in a documented loss of consciousness, and
 11 two resulting in a loss of consciousness resulting from either the head injury or
 12 Petitioner's intoxication. (FAP at 209-10, citing Ex. 14, Lodgment No. 134.) Petitioner
 13 also argues that counsel failed to prepare an adequate social history for Dr. Cermak's
 14 review, which should have included the additional background and family information
 15 contained in the declarations submitted to the California Supreme Court.²⁵ (FAP at 211-
 16 15.)

17 Two experts tested and evaluated Petitioner during post-conviction proceedings.
 18 Thomas Wegman, Ph.D., performed a neuropsychological evaluation of Petitioner over
 19 three days in October 2006, which included an interview of Petitioner, record review,
 20 and numerous tests. (Ex. 9, Lodgment No. 134 at 61.) Dr. Wegman noted: "As would
 21 be expected based upon Mr. Roybal's generally normal face-to-face presentation and
 22 demeanor, his rudimentary cognitive abilities are grossly intact. His IQ is below average
 23 but within broad normal limits; he has adequate basic skills in reading, writing and
 24 arithmetic; and he can communicate and interact normally." (*Id.* at 76.) The expert
 25

26 ²⁵ In Claim 7, Petitioner contends trial counsel was ineffective for failing to
 27 adequately investigate and present Petitioner's social history at the penalty phase, and
 28 relies upon the declarations of Frank Orozco, Ralph Roybal, Theresa Romero, Sylvia
 Sanchez and Jose Alvarez, in support of that claim. (FAP at 247-62.) The specifics of
 those declarations will be discussed in the adjudication of Claim 7, *infra*.

1 stated that “some higher-order, executive abilities are impaired” and Petitioner “has a
2 significantly impaired ability to inhibit automatic responses when under time pressure,”
3 which meant “a problem controlling impulses which may lead to inappropriate personal
4 behavior or possibly even violent acting out.” (Id.) Dr. Wegman stated that Petitioner’s
5 score on the Halstead-Reitan tests, which measure cerebral impairment, “indicates
6 moderately impaired cerebral functioning.” (Id. at 76-77.) “That there is impaired
7 functioning seems clear. Even the prosecution expert during the jury trial, Dr. Steven
8 Bucky, testified that Mr. Roybal suffered from a ‘mild, subtle brain dysfunction’ caused
9 by substance abuse.” (Id. at 77.) He also indicated that: “Based on the records I
10 reviewed, there is reason to think that traumatic brain injury may be a factor which
11 adversely affects his neurocognitive functioning.” (Id.) Dr. Wegman acknowledged that
12 Petitioner’s history of head injuries, alcohol, inhalant and other drug use, and genetic
13 factors were all possible contributing factors to the impaired functioning; he stated that
14 the tests were performed when Petitioner was “in a sober, alert state of mind,” and that
15 the results likely “would have been dramatically worse” had been Petitioner been under
16 the influence. (Id. at 77-78.) Dr. Wegman concluded that: “Mr. Roybal has mild
17 cerebral impairment which adversely affects his ability to inhibit automatic responses,
18 particularly when he is under pressure.” (Id. at 78.) He explained that: “Individuals with
19 the type of mild brain impairment which affects this form of executive ability become
20 very severely impaired when under the influence of mind-altering drugs such as alcohol.
21 If he is under the influence of alcohol it is most likely that his ability to control his
22 automatic impulses, inhibit panicked or frightened responses, and direct his behavior
23 intelligently would be virtually nonexistent.” (Id. at 78-79.)

24 Jeffrey Victoroff, M.D., a physician board-certified in neurology and psychiatry,
25 reviewed records and prior evaluations, interviewed and evaluated Petitioner in 2007,
26 and originally submitted a declaration in support of the state habeas petition. (Ex. 10,
27 Lodgment No. 134 at 80-89.) After discussing Petitioner’s history, Dr. Victoroff
28 addressed how, given the additional test results and information, he would have testified

1 differently from Dr. Cermak and questioned the assessment of Dr. Swenson, who
2 concluded at the time of trial that Petitioner had “no brain damage.” (Id. at 94-96.) Dr.
3 Victoroff stated: “The fact that Mr. Roybal had experienced multiple traumatic brain
4 injuries would have been available to the court at the time of the trial if a competent
5 neurological evaluation had been requested and conducted.” (Id. at 96-97.) He also
6 renders opinions on a number of potential and probable causes for Petitioner’s
7 functioning, including that: “Mr. Roybal *possibly* suffered brain damage in utero as a
8 result of his mother’s reported heavy drinking,” that he “*possibly* suffered permanent
9 brain injury and psychological injury due to parental deprivation and abuse,” that he
10 “*probably* suffered significant, permanent organic brain damage prior to 1989 as a result
11 of inhalant abuse,” that he “*possibly* has cortical irritability and a reduced threshold for
12 epileptic seizures due to the combination of neurotoxicity and traumatic brain injury,”
13 that he “*definitely* also developed extremely early onset alcohol dependence and alcohol
14 abuse,” that he “*definitely* suffered from multiple close head injuries, and it is virtually
15 certain that several of these constituted traumatic brain injuries,” and that he “*probably*
16 developed the syndrome of alcoholic blackouts early in life and has experienced
17 blackouts obliterating any memory of some events during some episodes of intoxication
18 ever since.” (Id. at 97-100) (emphasis in original.) Dr. Victoroff concludes that: “In my
19 opinion, as a result of a combination of inhalant neurotoxicity, alcohol abuse, and
20 traumatic brain injuries, Mr. Roybal has now and had in 1989 an abnormal brain and
21 multifaceted organic brain disorder.” (Id. at 101.) He also opines that: “Due to the
22 permanent, irreversible organic brain dysfunction in the frontal lobes that he had in 1989,
23 he had a substantially reduced cerebral ability to formulate a coherent plan of action, to
24 anticipate the consequences of his actions, or to restrain primitive behaviors.” (Id. at
25 101-02.) Dr. Victoroff opines that “given the very strong and convergent evidence that
26 he had an abnormal brain and multifaceted organic brain disorder and was grossly
27 intoxicated on the night of the instant offense, his actions that night were committed
28 under the influence of an extreme mental disturbance and his mental diseases combined
with the affects [sic] of his intoxication were almost certain to have rendered him unable

1 to appreciate the criminality of his conduct or to conform his conduct to the requirements
2 of the law.” (Id. at 102.)

3 Timmen Cermak, M.D., a physician board-certified in psychiatry and neurology
4 who testified for the defense during the penalty phase, also submitted a declaration
5 during the state habeas proceedings. (Ex. 60, Lodgment No. 142 at 1-17.) He states that
6 at the time of trial, “[t]he strategy had been determined by trial counsel that my testimony
7 was to build, as much as possible, upon the reports of Dr. Koshkarian and Dr. Friedman²⁶
8 and my own findings in order to assist the jury in understanding how influences beyond
9 Mr. Roybal’s control, such as maltreatment during his childhood, had contributed to his
10 personality development.” (Id. at 3.) Dr. Cermak evaluated Petitioner on May 8, 1992,
11 and submitted a report on July 1, 1992, after the guilt phase had begun, and states that
12 “[a]s a result of the very restricted time frame, I had no opportunity to provide input
13 regarding the quality or completeness of testing results provided me by the reports of
14 Drs. Koshkarian and Friedman. I also had no opportunity to provide input regarding the
15 full range of possibilities how my findings might be used (i.e., guilt vs. penalty phase).”
16 (Id.)

17 Dr. Cermak reviewed his prior trial testimony, the testimony of prosecution
18 rebuttal witness Dr. Bucky, the reports of Drs. Wegman, Victoroff, Friedman and
19

20
21 ²⁶ In his declaration, Dr. Cermak also indicates that at the time of Petitioner’s trial
22 in 1992, “it was my belief that Meredith Friedman was a neuropsychologist,” and that
23 while he noted contradictory findings between the evidence in her report and her
24 conclusions, “I did not question this seeming contradiction between the test results and
25 her negative finding because when I reviewed documents and testified in Mr. Roybal’s
26 case in 1992, it was my belief that Meredith Friedman was a neuropsychologist.” (Id.
27 at 6-7.) Dr. Cermak states that the opinion of a neuropsychologist would be more
28 informed than his own opinion, as a psychiatrist, and “What I did not know at the time
was that Dr. Friedman was a clinical psychologist and not trained as a
neuropsychologist.” (Id. at 7.) However, Dr. Cermak’s assertions in this regard do not
appear to be clearly supported by the record. First, Dr. Cermak testified at trial that Dr.
Friedman was a psychologist. (RT 6065, 6067.) Dr. Cermak also testified that he
reviewed Dr. Friedman’s 1992 report and relied on her test results. (See RT 6065, Ex.
60, Lodgment No. 142 at 4.) The letterhead on Dr. Friedman’s 1992 report clearly reads
“Meredith Friedman, Ph.D. Forensic and Clinical Psychology.” (Ex. 12, Lodgment No.
134 at 125; see also Ex. 65, Lodgment No. 142 at 124.)

1 Koshkarian, and a social history compiled by Dr. Katherine DiFrancesca²⁷ “to determine
 2 what impact, if any, they would have on my opinions and prior testimony concerning Mr.
 3 Roybal.” (Id. at 4.) Dr. Cermak stated that Dr. Friedman’s report “did not provide a
 4 complete or coherent picture” of Petitioner’s brain function and Dr. Koshkarian’s
 5 evaluation similarly provided an “inaccurate” picture. (Id. at 5.) Dr. Cermak stated that
 6 while Dr. Friedman found evidence of organicity, her report contained contradictions and
 7 used certain terms, which “mis-guided the defense and me towards efforts to explain Mr.
 8 Roybal’s personality primarily on the basis of his chemical dependence and past
 9 experiences.” (Id. at 9.)

10 Dr. Cermak stated that Dr. Wegman’s evaluation was more thorough and in-depth
 11 than that of Dr. Friedman, and contained “more evidence of specific brain damage,” such
 12 as Petitioner’s frontal lobe dysfunction and performance under pressure. (Id. at 11.) He
 13 stated that the results obtained by Dr. Wegman were from tests available at the time of
 14 Petitioner’s 1992 trial, and “these tests would have radically changed the focus of my
 15 opinion and testimony in 1992 from personality issues to evidence of organicity and
 16 impact on behavior.” (Id. at 12.) Dr. Cermak opined that “[t]he evidence of organicity
 17 would have supported a clear and non-speculative diagnosis that would have withstood
 18 the rebuttal testimony of Dr. Stephen Bucky, Ph.D., that Mr. Roybal suffered from Anti-
 19 Social Personality Disorder rather than an involuntary impairment of his higher
 20 executive functions as a result of organic brain damage.” (Id. at 17.)

21 **C. Claim 5- Guilt Phase**

22 Petitioner argues that trial counsel failed to adequately investigate and present
 23 evidence of organic brain damage during the guilt phase and asserts that “[r]easonably
 24 competent counsel would have known that evidence that Mr. Roybal was unable to
 25 appreciate the criminality of his conduct or conform his conduct to the requirements of
 26 the law would have been a basis for the defense of diminished actuality and whether he
 27

28 ²⁷ The social history and accompanying declaration of Dr. DiFrancesca are discussed in greater detail in the adjudication of Claim 7, infra.

1 would have had the ability to form the specific intent necessary to commit the underlying
2 crimes of burglary and robbery necessary for felony murder under California law.” (FAP
3 at 221) (citations omitted.) Under clearly established federal law, “counsel has a duty
4 to make reasonable investigations or to make a reasonable decision that makes particular
5 investigations unnecessary.” Strickland, 466 U.S. at 691.

6 Defense counsel Campbell, who was primarily responsible for the guilt phase
7 proceedings, states that: “Based upon my review of the subsequently prepared reports
8 of Dr. Thomas Wegman, Ph.D., and the declaration of Dr. Jeffrey Victoroff, M.D., that
9 have been filed with Mr. Roybal’s habeas corpus petition, I now believe there was an
10 inadequate investigation of organic brain injury during both the guilt and penalty
11 phases.” (Ex. 66, Lodgment No. 143 at 3-4.) He also declares that: “I recall no strategic
12 or tactical reason not to investigate organic brain damage or to present such evidence in
13 either the guilt or penalty²⁸ phases.” (Id. at 4.) Trial counsel Cannon, who primarily
14 handled the penalty phase proceedings, offers a similar statement. (Ex. 67, Lodgment
15 No. 143 at 12-13.)

16 Despite counsels’ indication that they did not recall a tactical or strategic reason
17 for failing to adequately investigate organic brain damage, the record clearly reflects that
18 counsel conducted an extensive investigation of Petitioner’s brain functioning, including
19 specifically investigating the existence of organic brain damage. The Public Defender
20 was appointed in June 1991. (See PT-1, PT-2, Lodgment Nos. 47, 48.) During
21 preparation for trial, counsel retained and consulted a number of mental health and
22 medical experts in early 1992, including but not limited to Dr. Friedman, Dr. Koshkarian
23 and Dr. Cermak. Dr. Koshkarian’s report is dated April 27, 1992 and Dr. Friedman
24 issued a report dated May 1, 1992, which noted organicity and brain damage, over six
25 weeks before the start of the guilt phase. While Dr. Cermak indicates that he was not
26

27 ²⁸ As discussed in more detail with respect to Claim 6, *infra*, the penalty phase
28 assertion is contradicted by the record, as the record clearly reflects that the defense
presented evidence of organic brain damage at the penalty phase proceedings, through
the testimony of Dr. Cermak.

1 retained in time to provide input as to potential guilt phase defenses, his own declaration
2 reflects that trial counsel had already decided to introduce the expert evidence at the
3 penalty phase, not at the guilt phase. Dr. Cermak acknowledges that “[t]he strategy had
4 been determined by trial counsel that my testimony was to build, as much as possible,
5 upon the reports of Dr. Koshkarian and Dr. Friedman and my own findings in order to
6 assist the jury in understanding how influences beyond Mr. Roybal’s control, such as
7 maltreatment during his childhood, had contributed to his personality development.”
8 (Ex. 60, Lodgment No. 142 at 3.) Thus, at the time of Dr. Cermak’s evaluation, counsel
9 had already retained two mental health experts to interview, test and evaluate Petitioner
10 between February and April 1992, and had obtained the results of that testing, as well
11 as reports from both individuals. Petitioner fails to allege that either Dr. Friedman or Dr.
12 Koshkarian recommended additional testing, and there is no indication that counsel
13 failed to follow up on any avenue of investigation in this regard.

14 Dr. Bucky, who testified at the penalty phase proceedings in rebuttal,
15 acknowledged that the tests Dr. Friedman performed were “to measure organic brain
16 dysfunction.” (RT 6269.) He stated that the given tests did not measure “psychological
17 functioning,” and different tests, which were not given, would be used to test for
18 antisocial personality disorder. (RT 6270.) Dr. Bucky stated that when an expert was
19 retained, they were normally given a “referral question,” and that based on Dr.
20 Friedman’s report: “It appears that the question was: evaluate the organic brain
21 functioning of this individual.” (RT 6271-72.) Dr. Bucky acknowledged that Dr.
22 Friedman concluded Petitioner “has organic brain damage.” (Id.) Thus, despite the
23 statement that trial counsel “recall[s] no strategic or tactical reason not to investigate
24 organic brain damage or to present such evidence in either the guilt or penalty phases,”
25 (see Ex. 66, Lodgment No. 142 at 4), the record reflects that counsel investigated this
26 avenue.

27 Petitioner also asserts that trial counsel was ineffective for failing to provide Dr.
28 Cermak and the other experts with adequate background information, particularly

1 concerning Petitioner's history of head trauma.²⁹ (FAP at 208.) Trial counsel Campbell
 2 states: "I am also aware that Dr. Cermak states in his declaration that, like Drs. Friedman
 3 and Koshkarian, he was not given Mr. Roybal's complete medical records prior to trial
 4 and that those records, if reviewed, would have documented a history of head trauma far
 5 more frequent than the two incidents noted in Dr. Koshkarian's report. [¶] I wish we
 6 had conducted a more complete investigation into the history of organic brain injury.
 7 The failure to do this more complete investigation was, as I recall, neither a strategic nor
 8 tactical decision." (Lodgment No. 143 at 5-6, Ex. 66.)

9 With respect to the guilt phase, the Ninth Circuit has declined to require counsel
 10 to affirmatively provide adequate records to an expert. See Hendricks v. Calderon, 70
 11 F.3d 1032, 1038-39 (9th Cir. 1995) ("To now impose a duty on attorneys to acquire
 12 sufficient background materials on which an expert can base reliable psychiatric
 13 conclusions, independent of any request for information from an expert, would defeat
 14 the whole aim of having experts participate in the investigation. . . . To require an
 15 attorney, without interdisciplinary guidance, to provide a psychiatric expert with all
 16 information necessary to reach a mental health diagnosis demands that an attorney
 17 already be possessed of the skill and knowledge of the expert.") The record reflects that
 18 both defense counsel and the experts were aware of some history of head trauma, which
 19 had been noted in Dr. Koshkarian's report. There is no indication in the record that Dr.
 20 Cermak requested additional records that counsel failed to provide; the record also
 21 reflects that Dr. Cermak was provided with substantial background information,
 22 including Petitioner's treatment records from Seadrunar and Rio Grande ATC,
 23 correctional records, records from the Las Vegas Medical Center, and interviews with

24
 25 ²⁹ Based on a review of the FAP and record, it is unclear to what extent trial
 26 counsel obtained Petitioner's medical records before trial. In the FAP, Petitioner
 27 contends that "trial counsel did not obtain or review his medical records from St. Vincent
 28 Medical Center in Santa Fe, New Mexico." (FAP at 209.) However, trial counsels'
 declaration indicates that the "prosecution" and "defense" had Petitioner's medical
 records. In any event, this apparent contradiction does not impact Petitioner's contention
 that counsel failed to provide Dr. Cermak and the other experts with adequate
 background information.

1 family members and other individuals. Petitioner fails to demonstrate that counsel acted
2 deficiently in this respect.

3 In addition to the asserted failures in investigation, Petitioner asserts that counsel
4 was ineffective in failing to present a mental health defense at the guilt phase, and argues
5 that the defense of alibi and third party culpability that was presented was not strategic
6 because counsel had not adequately investigated Petitioner's brain injury. (FAP at 222.)
7 Petitioner contends: "Evidence that would have shown Mr. Roybal lacked the capacity
8 while intoxicated, as a result of a mental disease or defect, to appreciate the criminality
9 of his conduct or conform his conduct with the requirements [sic] the law, would have
10 been highly probative to show he did not have the specific intent to permanently deprive
11 necessary to prove either burglary or robbery." (*Id.* at 221-22.) He also alleges that
12 "reasonably competent counsel would also have known that evidence of organic brain
13 injury during the guilt phase would have been highly probative on an element necessary
14 to prove the special circumstance necessary for Mr. Roybal to be eligible for either a
15 death sentence or a sentence of life without parole." (*Id.* at 222.)

16 Under current California law, which was in existence at the time of the crimes at
17 issue in this case as well as at the time of Petitioner's trial:

18 Evidence of mental disease, mental defect, or mental disorder shall not be
19 admitted to show or negate the capacity to form any mental state, including,
20 but not limited to, purpose, intent, knowledge, premeditation, deliberation,
21 or malice aforethought, with which the accused committed the act.
22 Evidence of mental disease, mental defect, or mental disorder is admissible
solely on the issue of whether or not the accused actually formed a required
specific intent, premeditated, deliberated, or harbored malice aforethought,
when a specific intent crime is charged.

23 Cal. Penal. Code § 28(a). As such, while a diminished capacity³⁰ defense was not
24 available, California law allowed for the introduction of evidence of diminished
25 actuality.

27 ³⁰ Diminished capacity was abolished by the California legislature in 1981, and in
28 1982 by the passage of Proposition 8. See *People v. Spurlin*, 156 Cal. App. 3d 119, 127-
28 (1984). Both events occurred well before the June 1989 murder of Yvonne Weden.

1 While trial counsel now state that they did not “recall” a strategic reason not to
2 present organic brain damage at the guilt phase proceedings, it is clear from Dr.
3 Cermak’s declaration that counsel retained his services for the penalty phase, as he was
4 instructed to focus on Petitioner’s personality issues. “A fair assessment of attorney
5 performance requires that every effort be made to eliminate the distorting effects of
6 hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to
7 evaluate the conduct from counsel’s perspective at the time.” Strickland, 466 U.S. at
8 689. The record reflects that counsel investigated Petitioner’s organic brain damage
9 prior to the guilt phase. In light of this investigation, Petitioner fails to show that the
10 decision to present that evidence at the penalty phase, and proceed with a different guilt
11 phase defense, was not tactical at the time it was made. Counsel retained two experts,
12 one who noted organicity as well as substance abuse and borderline intellectual
13 functioning, and the other who, in addition to the substance abuse, diagnosed Petitioner
14 as having a mixed personality disorder, including antisocial and schizoid. Neither expert
15 offered an opinion, or any indication, that Petitioner was unable to form the intent to
16 commit the crimes at issue, and counsel cannot be faulted for failing to present a defense
17 that was not supported, or even indicated, by the experts’ results. See Earp v. Cullen,
18 623 F.3d 1065, 1077 (9th Cir. 2010) (“An expert’s failure to diagnose a mental condition
19 does not constitute ineffective assistance of *counsel*, and [petitioner] has no
20 constitutional guarantee of effective assistance of experts.”)

21 Dr. Victoroff states that Petitioner’s “actions that night were committed under the
22 influence of extreme mental disturbance and his mental diseases combined with the
23 affects [sic] of his intoxication were almost certain to have rendered him unable to
24 appreciate the criminality of his conduct or to conform his conduct to the requirements
25 of the law.” (Lodgment No. 134 at 102, Ex. 10.) To the extent this opinion, had it been
26 rendered at the time of trial, addresses whether Petitioner actually formed the required
27 intent to commit the charged crimes rather than his capacity to commit the crime, state
28

1 law sharply limits expert testimony on this subject. See Cal. Penal Code §§ 28(a), 29³¹;
 2 see also People v. Coddington, 23 Cal. 4th 529, 582 (2000) (California law allows the
 3 “introduction of evidence of mental illness when relevant to whether a defendant actually
 4 formed a mental state that is an element of a charged offense, but do[es] not permit an
 5 expert to offer an opinion on whether a defendant had the mental capacity to form a
 6 specific mental state or whether the defendant actually harbored such a mental state.”),
 7 overruled on other grounds by Price v. Superior Court, 25 Cal. 4th 1046 (2001). Trial
 8 counsel was undoubtedly aware of these limitations, as on June 22, 1991, the prosecutor
 9 filed a motion in limine to limit any psychiatric testimony by the defense on the subject
 10 of Petitioner’s capacity, and the matter was later discussed during a motions hearing.
 11 (CT 1747-64; RT 5240-43.) In any case, despite counsels’ efforts in obtaining relevant
 12 background materials and retaining mental health experts to evaluate Petitioner before
 13 trial, neither expert indicated that Petitioner was unable to form the intent to commit the
 14 charged crimes.

15 More importantly, had counsel decided to present a mental health defense at the
 16 guilt phase, it clearly would have conflicted with the defense of alibi and third-party
 17 culpability.³² At the guilt phase, the defense contended that Petitioner was drunk and had
 18 passed out at his brother’s home at the time of the crimes, and that while he was later
 19 found in possession of the victim’s jewelry, there was no direct evidence that he was

20 ³¹ This statute reads as follows:

21 In the guilt phase of a criminal action, any expert testifying about a
 22 defendant’s mental illness, mental disorder, or mental defect shall not
 23 testify as to whether the defendant had or did not have the required mental
 24 states, which include, but are not limited to, purpose, intent, knowledge, or
 25 malice aforethought, for the crimes charged. The question as to whether the
 26 defendant had or did not have the required mental states shall be decided
 27 by the trier of fact.

28 Cal. Penal Code § 29.

³² The detailed declarations from trial counsel do not address how or when counsel
 arrived at their decision on what guilt phase defense to present, nor do the declarations
 offer any indication as to how a mental state defense should have been presented either
 in conjunction with, or in the place of, the defense asserted at trial.

involved in the murder. Dr. Koshkarian's report reflects that Petitioner "denied the charges against him and said that he had found the jewelry in a sock on the street when he was riding his bicycle that day." (Ex. 11, Lodgment No. 134 at 119.) Both Petitioner's brother and sister-in-law testified that Petitioner was falling-down drunk that evening, his mother testified that she told police Petitioner was drunk when he called her that evening, and his brother stated that Petitioner was passed out in bed when he checked on him later that evening.

It is "within the broad range of professionally competent assistance for [defense counsel] to choose not to present psychiatric evidence which would have contradicted the primary defense theory." Correll v. Stewart, 137 F.3d 1404, 1411 (9th Cir. 1998); see also Williams v. Woodford, 384 F.3d 567, 611-12 (9th Cir. 2004) ("Having reasonably selected an alibi defense as the primary defense theory, [counsel] no longer had a duty to investigate a conflicting mental-state defense."), citing Bean v. Calderon, 163 F.3d 1073, 1081-82 (9th Cir. 1998) (same). Given the evidence and expert opinion available to counsel at the time of trial, Petitioner fails to demonstrate that counsel's performance at the guilt phase was deficient.

Even if Petitioner was able to demonstrate that counsel erred in not presenting a mental health defense at the guilt phase, the claim also fails for lack of prejudice.³³ See Strickland, 466 U.S. at 691 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.") As noted above, even if an opinion such as Dr. Victoroff's was

³³ In the written pleadings on Claim 5, Petitioner contests Respondent's assertion that there is no prejudice due to the state law limitations on the introduction of mental state evidence at the guilt phase by arguing in part that: "It bears repeating that this was not a jury that easily reached the penalty determination. It took days, and only after the substitution of a juror and after the erroneous supplemental instruction, did the jury return the recommendation of death." (Traverse at 66.) However, Claim 5 is a guilt phase claim, and references to the jury's penalty phase deliberations are of no utility to the Court's analysis of guilt phase prejudice. The Court will consider this argument with respect to Petitioner's claims asserting ineffective assistance of counsel at the penalty phase.

1 available at the time of trial, California law precludes an expert from testifying that a
2 defendant did not in fact form the intent to commit the crime, as that is a question to be
3 determined by the jury. See Cal. Penal Code § 29. Had the defense presented mental
4 state evidence in the guilt phase, there are numerous documents in the record that would
5 have hindered efforts to demonstrate a lack of intent. For instance, Dr. Koshkarian
6 diagnosed Petitioner as having a mixed personality disorder, antisocial and schizoid.
7 (Ex. 11, Lodgment No. 134 at 123.) Dr. Koshkarian discussed Petitioner's history,
8 including his criminal activity and drug use, and that Petitioner's mother stated: "When
9 he was sober he was a good person who was a responsible hard worker who helped
10 around the house, but when he was intoxicated she was frightened of him because he
11 sometimes would become angry and threatening with her." (Id. at 117.) Similarly, a
12 1976 Las Vegas Medical Center admission form, which Petitioner acknowledges was
13 obtained during the pre-trial investigation, indicated that "[t]he patient further states that
14 he becomes violent when intoxicated and this seems to constantly get him into trouble."
15 (Ex. 24, Lodgment No. 136 at 537.) At the penalty phase, Petitioner introduced mental
16 state evidence, and both defense expert Dr. Cermak and prosecution expert Dr. Bucky
17 were examined at length about Dr. Koshkarian's report and whether or not Petitioner fit
18 the criteria for a diagnosis of antisocial personality disorder. Had counsel advanced a
19 mental state defense at the guilt phase, it clearly would have been harmful and at cross-
20 purposes with the asserted alibi defense. Given the potential for harmful cross-
21 examination and rebuttal testimony, the evidence about Petitioner's violence when
22 drinking, the state-law proscribed limitations on expert testimony regarding whether a
23 defendant formed the requisite intent, and the weakness of the proposed defense in
24 comparison to the defense advanced at trial, Petitioner fails to show any "reasonable
25 probability that, but for counsel's unprofessional errors, the result of the proceeding
26 would have been different." Strickland, 466 U.S. at 694. Petitioner is not entitled to
27 habeas relief on Claim 5.

28 **D. Claim 6**

Petitioner contends that trial counsel failed to adequately investigate and present

1 evidence of organic brain damage in mitigation at the penalty phase. (FAP at 224-47.)
2 In particular, Petitioner asserts that counsel failed to obtain complete medical records,
3 failed to compile sufficient social history information, and failed to obtain adequate
4 testing, which would have provided evidence with respect to two statutory mitigating
5 factors, Cal. Penal Code § 190.3(d) and (h). (Id. at 241.)

6 A defense attorney's duty to investigate mental health issues differs between the
7 guilt and penalty phases. See Hendricks, 70 F.3d at 1043 ("Evidence of mental problems
8 may be offered to show mitigating factors in the penalty phase, even though it is
9 insufficient to establish a legal defense to conviction in the guilt phase."); see also
10 Wallace v. Stewart, 184 F.3d 1112, 1117 (9th Cir. 1999) ("Although the lawyer's failure
11 to develop and relay medical evidence did not constitute ineffective assistance at the
12 guilt phase, we concluded that sentencing- where mitigation evidence may very well be
13 the key to avoiding the death penalty- is different."), citing Caro v. Calderon, 165 F.3d
14 1223, 1227 (9th Cir. 1999).

15 Petitioner does not contend that trial counsel completely failed to present any
16 mental health evidence in mitigation, but that counsel failed to perform adequately in
17 several respects. Petitioner asserts that counsel failed to provide the experts, Dr. Cermak
18 in particular, with Petitioner's complete medical records and social history. Petitioner
19 spends significant time detailing numerous head injuries he suffered between 1982 and
20 1987 documented in the St. Vincent medical records which were not provided to the
21 experts or noted at trial. But it is apparent that the examining experts were aware that
22 Petitioner had suffered prior head injuries, as Dr. Koshkarian noted several prior head
23 injuries in his report and evaluation, Frank Orozco noted and testified about Petitioner's
24 fall out of his crib as a baby, and Dr. Cermak reviewed and relied upon both Dr.
25 Koshkarian's report and Frank Orozco's statements. With respect to the social history
26 information, the record reflects that Dr. Cermak reviewed a significant amount of
27 background materials, including substance abuse treatment records which detailed
28 Petitioner's lengthy history of alcohol and drug abuse, correctional records which

1 included a prior psychological assessment, probation and police reports, viewed and
 2 conducted family member interviews, and reviewed defense investigator interviews from
 3 numerous individuals connected to Petitioner. (RT 6064-65, see also Ex. 60, Lodgment
 4 No. 142 at 3.)

5 Trial counsel Kathleen Cannon, who was primarily responsible for the penalty
 6 phase proceedings, notes that Dr. Friedman and Dr. Koshkarian's reports do not "refer
 7 to any neuro-psychological information concerning Mr. Roybal," and declares that:

8 Based upon my review of the subsequently prepared reports of Dr. Thomas
 9 Wegman, Ph.D., and the declaration of Dr. Jeffrey Victoroff, M.D., that
 10 have been filed with Mr. Roybal's habeas corpus petition, I now believe
 11 there may have been a need to do more investigation of organic brain injury
 12 during both the guilt and penalty phases. The discovery provided by the
 13 prosecution and collected by the defense prior to trial revealed that Mr.
 14 Roybal had suffered neurological damage as a result of repeated head
 15 trauma and substance abuse from his early childhood. I do not recall any
 16 strategic or tactical reason to not present evidence similar to that presented
 17 in the habeas petition.

18 (Ex. 67, Lodgment No. 143 at 12-13.)

19 Despite counsel's apparent concession, the record reflects that defense counsel did
 20 investigate and present evidence of organic brain damage at the penalty phase. It is also
 21 clear that while counsel may not have provided the experts with complete medical or
 22 social history records, the testifying expert was provided with a significant amount of
 23 background information, counsel retained a psychologist who performed a battery of
 24 tests designed to determine if Petitioner had organic brain damage, and the expert was
 25 aware that Petitioner had a history of head injuries, substance abuse, an alcoholic mother,
 26 and childhood abuse and neglect.

27 Dr. Cermak's declaration³⁴ primarily addresses how the additional testing and
 28 evaluation performed by Drs. Wegman and Victoroff would have changed or
 strengthened his trial testimony. Dr. Cermak found Dr. Wegman's testing to be "more

³⁴ As an ancillary matter, Dr. Cermak acknowledges that there were inaccuracies
 in his trial testimony. For instance, when he was asked about evidence of frontal lobe
 damage at trial, he testified that "testing showed no evidence" of such damage. (Ex. 60,
 Lodgment No. 142 at 15, citing RT 6015.) Dr. Cermak admits that "Dr. Friedman's
 report contained evidence of frontal lobe dysfunction," and he should have instead
 specified that "testers did not conclude that frontal lobe damage existed." (Id.)

1 thorough in quality, depth, and detail” than Dr. Friedman’s evaluation. (Id. at 9.) While
2 Dr. Friedman “documented strong evidence for organic brain damage,” Dr. Cermak
3 states that she “also reported some specific negative findings” which impacted his trial
4 testimony. (Id. at 6.) Although Dr. Cermak testified at trial that it was “very, very likely
5 that what we’re dealing with is organic brain damage,” he states that given the
6 information in Dr. Wegman’s and Dr. Victoroff’s reports, he would not have
7 equivocated, but would have “declared without hesitation that Rudolph Roybal suffers
8 from significant organic brain damage.” (Id. at 15, citing RT 6070.) With this new
9 information, Dr Cermak also would have “answered more definitively that strong
10 evidence of frontal lobe damage exists.” (Id.)

11 Dr. Cermak asserts that the post-conviction testing and evaluations “would have
12 made a fundamental difference” in his trial testimony, as “[r]ather than focusing on
13 personality issues” he “would have focused on evidence that he lacked the capacity to
14 exercise normal levels of judgment, especially when under stress and most predictably
15 when under the influence of alcohol.” He asserts that “[t]he evidence of organicity
16 would have supported a clear and non-speculative diagnosis that would have withstood
17 the rebuttal testimony of Dr. Stephen Bucky, Ph.D., that Mr. Roybal suffered from Anti-
18 Social Personality Disorder rather than an involuntary impairment of his higher
19 executive functions as a result of organic brain damage.” (Id. at 16-17.)

20 “[T]he relevant inquiry under Strickland is not what defense counsel could have
21 pursued, but whether the choices made by defense counsel were reasonable.” Siripongs
22 v. Calderon, 133 F.3d 732, 736 (9th Cir. 1998), citing Strickland, 466 U.S. at 690. As
23 previously discussed, Dr. Cermak states that “[t]he strategy had been determined by trial
24 counsel that my testimony was to build, as much as possible, upon the reports of Dr.
25 Koshkarian and Dr. Friedman and my own findings in order to assist the jury in
26 understanding how influences beyond Mr. Roybal’s control, such as maltreatment during
27 childhood, had contributed to his personality development. My focus, pursuant to
28 counsel’s strategy, was solely on personality issues.” (Ex. 60, Lodgment No. 142 at 2-3.)

1 Yet Dr. Cermak's trial testimony did not exclusively address personality issues, as he
2 discussed Petitioner's brain impairment at length and stated that Petitioner had
3 "significant impairment in several different realms. He has significant impairment
4 cognitively due to some brain dysfunction." (RT 6066.) "Most of the basis of this
5 finding is the report generated by Meredith Friedman, the psychologist who tested him,
6 and in my interview with Mr. Roybal, everything was consistent with that." (RT 6067.)
7 Dr. Cermak also testified that the results of testing "demonstrated that it is very, very
8 likely that what we're dealing with is organic brain damage," and that the damage "was
9 almost certainly genetic." (RT 6067-71.) Rebuttal witness Dr. Bucky also addressed the
10 matter of brain damage. While Dr. Bucky contended that the test results "indicate no
11 observable organic brain damage," he also clarified that he was not saying Dr. Friedman
12 was wrong in finding organic brain damage, but that "if there is brain dysfunction, it is
13 very subtle." (RT 6276.) Dr. Bucky also acknowledged that Dr. Friedman concluded
14 Petitioner "has organic brain damage." (RT 6271-72.)

15 "Judicial scrutiny of counsel's performance must be highly deferential."
16 Strickland, 466 U.S. 689. This is not a situation where counsel failed to conduct any
17 investigation into mental health mitigation, as counsel retained three mental health
18 experts to interview and evaluate Petitioner, compiled numerous records from
19 Petitioner's time in substance abuse treatment, as well as correctional records including
20 a psychological evaluation, interviewed family members, friends, and acquaintances, and
21 supplied these materials to their testifying expert. Petitioner asserts that counsel was
22 deficient in failing to gather evidence of additional head injuries and failing to retain an
23 expert to conduct additional testing that would have solidified and strengthened the
24 evidence of organic brain damage. But the record shows that counsel furnished the
25 retained experts with information about Petitioner's history, including that he had
26 suffered head injuries, such as the incident where he was hit by a car, hit with a crowbar,
27 and fell out of his crib as a baby, each necessitating a trip to the hospital. Dr. Friedman
28 conducted an extensive battery of tests over three days and found organic brain damage,

1 which counsel presented through the penalty phase testimony of Dr. Cermak. Although
2 Petitioner now asserts that had additional records been obtained, and had additional tests
3 been performed, the expert testimony would have been stronger and would have
4 withstood cross-examination and rebuttal testimony, that is not the standard. See
5 Strickland, 466 U.S. at 689 (“A fair assessment of attorney performance requires that
6 every effort be made to eliminate the distorting effects of hindsight, to reconstruct the
7 circumstances of counsel’s challenged conduct, and to evaluate the conduct from
8 counsel’s perspective at the time.”) In fact, the post-conviction experts concur with the
9 results of trial counsels’ investigation, as Drs. Wegman and Victoroff conclude that
10 Petitioner suffers from organic brain damage, just as Dr. Cermak testified to at trial.

11 Indeed, the trial judge recognized at sentencing that with respect to Cal. Penal
12 Code section 190.3(d), “[w]e do have testimony by several experts concerning the
13 defendant having suffered or not suffered or to the extent to which he had suffered from
14 alleged mental deficit, disease or organic brain syndrome” as well as fetal alcohol
15 syndrome. (RT 6748.) The judge also found there was “lots of evidence on this [Cal.
16 Penal Code section 190.3] (h) factor,” and discussed Petitioner’s intoxication as well as
17 again noting the various diagnoses of the testifying experts. (RT 6755-56.) Given Dr.
18 Cermak’s expert testimony that Petitioner had significant impairment and “very, very”
19 likely brain damage, as well as Dr. Bucky’s concession that Dr. Friedman had found
20 organic brain damage, defense counsel clearly presented the jury with evidence and
21 expert testimony about organic brain damage. Counsels’ performance was not deficient.

22 In the alternative, the claim also fails because Petitioner is unable to demonstrate
23 that he suffered actual prejudice from this or any other alleged instance of deficient
24 performance, as discussed below in section C.5. See Strickland, 466 U.S. at 697;
25 Wiggins, 539 U.S. at 534 (“In assessing prejudice, we reweigh the evidence in
26 aggravation against the totality of the available mitigating evidence.”). As such, Claim
27 6 fails even under a de novo review. Petitioner is not entitled to habeas relief on
28 Claim 6.

1 **3. Claim 7**

2 Petitioner alleges that trial counsel failed to adequately investigate and present
3 evidence of his social history at the penalty phase of trial, and that additional evidence
4 could have shown the impact alcoholism had on Petitioner's family, as well as shown the
5 impoverished, drug-filled, violent and abusive environment in which he was raised. (Id.
6 at 247-55.)

7 Petitioner raised this contention as part of Claim 1 in the state habeas petition.
8 (Lodgment No. 133.) The California Supreme Court rejected the claim on the merits
9 without a statement of reasoning. (Lodgment No. 144.)

10 **A. Petitioner's Penalty Phase Presentation**

11 In addition to Dr. Cermak's testimony about the impact of Petitioner's upbringing
12 in an alcoholic, abusive, neglectful family, Petitioner's own substance abuse, learning
13 disabilities, and likely organic damage, the defense also presented testimony from a
14 number of other family members, past employers, counselors, and other individuals. As
15 discussed in more detail with respect to Claim 8, infra, the defense presented testimony
16 from Lucy Madrid and Nan Busby, who had counseled Petitioner at various points
17 during his treatment for substance abuse. (RT 5700-5848.) The defense also presented
18 testimony from Anthony Roybal and Phillip Sanchez, two of Petitioner's prior
19 employers, who each testified that Petitioner was a dependable and good worker. (RT
20 5632-40, 5654-60.) Judge James Blackmer, a former prosecutor, testified that Petitioner
21 pled guilty to several cases and was sent to Seadrunar on a suspended sentence, for
22 treatment, stating that Seadrunar was "one of the very top programs," and that, "It's often
23 tougher than going into prison." (RT 5968-76.) The defense also presented evidence
24 from several of Petitioner's family members, who detailed Petitioner's upbringing, the
25 environment of alcoholism, abuse, and neglect in which he was raised, and Petitioner's
26 own drug and alcohol use and abuse.

27 Petitioner's mother, Stella Orozco, testified that her own father was an alcoholic
28 who did not work, that she was the oldest of seven children, and that she did not go to

1 school, but, instead, worked to help her mother support the family. (RT 5543-44.) Stella
2 did not know how to read nor write, married at twenty, and lived in a small house with
3 outdoor plumbing. (RT 5544-48.) Stella and her husband adopted Frank; Stella later
4 became pregnant with Petitioner by another man, which led to her divorce. (RT 5548-
5 52.) She at one point offered to give Petitioner away in order to keep her husband. (RT
6 5553.) Stella had a son, Ralphie, by a man named Bob Barry, who she later learned was
7 married. (RT 5554-55.) Stella later met Dewey Brazfield and gave birth to Theresa.
8 (RT 5559-60.) Stella stated that Dewey “used to drink a lot and beat me a lot,” would
9 beat her every weekend, and would beat the children as well, including Petitioner. (RT
10 5560-61.) After Dewey cut her arm and threatened to cut her stomach while she was
11 eight months pregnant, Stella gave birth prematurely and lost the baby. (RT 5561-62.)
12 Stella stated that Petitioner did not do well in school, but Stella couldn’t help him, as she
13 did not know how. (RT 5563.) She was aware that Petitioner stopped going to school,
14 but stated that: “To tell you the truth, I didn’t care whether he went or not, because I
15 didn’t know anything myself.” (RT 5564.) Petitioner was good at drawing, but Stella
16 never encouraged him or praised him. (RT 5564-65.) Stella had a nickname for
17 Petitioner, “Mojo,” which was a reference to Petitioner’s father “because he was a
18 wetback.” (RT 5565.) When Petitioner was still in school, Stella took Theresa out of
19 state for several months and left Petitioner and Ralphie, both children at the time, alone
20 at the home with her sister living down the street to care for them; she returned every
21 month to check on them and left them plenty of food, and she thought that was when
22 Petitioner began to drink heavily. (RT 5565-66, 5604.) Petitioner once asked Stella
23 about his father, and she discouraged him from looking, stating that: “There is no use in
24 you looking for him because he’s probably married over there. All of those wetbacks are
25 married over there.” (RT 5567.) Stella was aware that Petitioner sniffed paint, even
26 while young; Dewey got angry at him for that and beat him. (RT 5568.) Stella discussed
27 Petitioner’s time in treatment and contacts with the police, and stated that: “He spent
28 more time in the programs and in jail than he has ever spent with me.” (RT 5572, 5607-

1 10.) Petitioner asked Stella to go with him to the programs or meetings and she declined,
2 telling him that he was the alcoholic, not her. (RT 5572.) Stella stated that Petitioner
3 was born in 1956, while the prosecutor noted that numerous court documents indicated
4 1955. (RT 5586.) Stella tried to bring Petitioner up right, taught him the difference
5 between right and wrong, and punished him when he stole or was bad. (RT 5590-91,
6 5594, 5607.) Dewey “used to get mad and hit” Petitioner, but Stella did not let Dewey
7 use knives on him; she protected and loved her children. (RT 5597-98.) Stella admitted
8 that she drank while pregnant with both Petitioner and Theresa, and that she used to
9 drink all weekend. (RT 5601.) Theresa had not been through drug and alcohol
10 programs. (RT 5602.)

11 Eddie Montoya, who grew up in Santa Fe and was married to one of Petitioner’s
12 cousins, had known Petitioner 27 years and often socialized with the family. (RT 5621-
13 23.) Montoya stated that Theresa was treated better than the boys in the family and that
14 Stella showed her daughter more affection. (RT 5626.) Petitioner came to live with
15 Montoya’s family for a time to try to find a job in their area. (RT 5626.) Montoya
16 acknowledged that a prior investigative report stated that Petitioner lived with them after
17 Stella kicked him out, but his recollection was that Petitioner wanted to find a job. (RT
18 5628-29.) When he socialized with Stella, they drank together. (RT 5630.) Montoya
19 never gave the children drugs or alcohol and never saw Stella hit the children in his
20 presence; he acknowledged he did not know much about how the children had been
21 raised. (RT 5631.)

22 Frank Orozco, Petitioner’s step-brother, took the stand again during the penalty
23 phase to discuss their childhood and upbringing. After his father left, the family was
24 very poor and his mother drank while pregnant with Petitioner. (RT 5849-50.)
25 Petitioner was a generally healthy child, but Frank recalled that Petitioner fell out of his
26 crib at about 18 months of age, breaking his front teeth and bleeding from the mouth.
27 (RT 5850-51.) Frank picked him up after unsuccessfully asking their mother to do so,
28 and went to get his aunt for help, as she was the only one with a car and a phone. (RT

1 5851.) Petitioner's aunt took him to the hospital, as Stella refused to go; Petitioner was
2 in the hospital for about a week, had a head injury and lost his teeth, but recovered well.
3 (RT 5852-53.) During this time, Stella "basically was a prostitute," and brought
4 numerous men home, sometimes leaving them alone while she went out, until she
5 became pregnant again, with Ralphie. (RT 5853-54.) Frank stated that Dewey was okay
6 when he was not drinking, but "he'd beat us for any reason" when he was drinking. (RT
7 5855-56.) Dewey was sober during the week when he worked, but was drunk on
8 weekends. (RT 5856.) Dewey treated Petitioner "like an outsider, like he wasn't part
9 of the family. He never was," stating that when the family went camping, Petitioner
10 would stay home. (RT 5857.) Petitioner was not good in school, was slow and hated it;
11 Frank unsuccessfully tried to help Petitioner with his schoolwork. (RT 5858.) Frank
12 went to live with their grandmother after he could no longer stand his mother's drinking
13 and bringing men home. (RT 5859-60.) Dewey would beat up Petitioner "every
14 weekend" and would use his belt to do so. (RT 5860-61.) Frank described an incident
15 where a social worker came to the home and Dewey hid because it was against the rules
16 to have him living there; Petitioner, who was around 4 years old, thought it was a game
17 of peek-a-boo; Dewey slammed him to the floor from his hiding place and later beat him
18 up after the social worker left. (RT 5861-62.) Frank also saw Dewey beat up Stella, and
19 defended her when he was about 16, then took Stella to the hospital and returned to his
20 grandmother's home. (RT 5862-64.) Petitioner was called stupid, a "wetback" or
21 "mojado" because his father was one, and was unfavorably compared to Frank. (RT
22 5866.) When they were young, the family was very poor and would scavenge from the
23 dump for things such as food, copper wire, and books. (RT 5868-69.) Frank never saw
24 his mother put her arms around Petitioner; his view of her parenting was to provide food
25 and shelter. (RT 5871-73.) Frank attributed the differences in his own life to his
26 grandmother's influence. (RT 5873-74.) Frank stated that when Dewey was not
27 drinking, he was a "good" or "great" guy. (RT 6010.) Their relatives were unavailable
28 to help his family "[b]ecause they were all alcoholics and they were all as deprived of the

1 worldly goods as we were, if not as bad,” although Frank stated that his family was “[a]
2 hundred times poorer” than the other families in the area, as the other families had indoor
3 plumbing while his family had an outhouse. (RT 6011-12.)

4 **B. Information Submitted in Post-Conviction Proceedings**

5 Petitioner has submitted a number of declarations from several members of his
6 immediate and extended family. He contends that these individuals either were not
7 contacted before trial or were not asked to testify, and they could have provided
8 additional relevant information about the alcoholism in Petitioner’s family and about the
9 environment and community in which Petitioner was raised. Petitioner also submits the
10 declaration of a social historian.

11 Petitioner’s younger brother Ralph, or Ralphie, Roybal, who was in prison in New
12 Mexico at the time of his 2007 declaration, stated that he and Petitioner grew up in a
13 very poor area, with a large amount of drinking and drug use, and that few people in the
14 area had jobs. (Ex. 5, Lodgment No. 134 at 34.) Many of the children that grew up with
15 them “are now either in jail or dead.” (Id.) Ralph liked school and did well, but
16 Petitioner did not like school and skipped it to spend time with his friends. (Id.) Ralph
17 went into the military after obtaining his GED, left the military after a court-martial, and
18 was charged with murder in 1987. (Id. at 34-35.) Ralph pled guilty, was sentenced to
19 six years in prison, and was released in 1991, stating that “[a]t the time of this offense,
20 I was drinking a lot and I had blackouts. I was honest when I told the judge at the time
21 I entered the guilty plea that I could not remember everything about the offense.” (Id.
22 at 35.) Growing up, Petitioner ran away from home for days at a time, stayed with his
23 friends, and sniffed paint. (Id.) Their mother and step father “drank a lot and would
24 fight,” and Ralph left home as soon as he got his GED, entering the military. (Id.) Ralph
25 related an incident when he went deer hunting with Dewey and his friends, and Dewey,
26 who had been drinking, accidentally shot his friend in the back and killed him; he was
27 not charged for the accidental murder. (Id. at 35-36.) He also stated that: “Dewey and
28 Stella used to discipline us when we did something wrong; Dewey spanked us with his

1 belt.” (Id. at 36.) Ralph stated that a number of people in their extended family, such
 2 as aunts and uncles, were heavy drinkers and “many of them died because of their
 3 drinking.” (Id.) Ralph states that “[n]o one on Rudolph’s defense team ever talked to
 4 me before or during
 5 his trial,” and he would have been willing to testify.³⁵ (Id.)

6 Theresa Romero, Petitioner’s younger sister, stated that several members of the
 7 extended family died young as a result of alcoholism. (Ex. 4, Lodgment No. 134 at 31.)
 8 She stated that: “During my childhood years, both of my parents drank and fought a lot,”
 9 and Petitioner would sit with her and offer to protect her. (Id.) Her parents often broke
 10 things while fighting, such as plates on a shelf, and her last memory of her father Dewey
 11 was “him getting high on marijuana.” (Id. at 31-32.) Petitioner was “a very loving
 12 person while sober,” but when he was drinking and sniffing paint Theresa “was afraid
 13 of him.” (Id.) Her grandfather was abusive and violent towards her grandmother when
 14 he was drunk, and several aunts and uncles on her mother’s side were also alcoholics.
 15 (Id.) A number of people in their neighborhood growing up died of alcoholism, were
 16 drug addicts; several others were sent to prison for various crimes, including murder.
 17 (Id.) The defense team contacted Theresa about Petitioner’s 1989 arrest, but did not ask
 18 about their family history or the history of alcoholism. (Id.)

19 Petitioner also submits a declaration from his brother Frank, who adds several
 20 details to his trial testimony. Frank stated that Petitioner was a loner as a child and did
 21 not fit in with the family. (Ex. 3, Lodgment No. 134 at 26.) With respect to Petitioner’s
 22 “mojado” nickname, Frank added that Petitioner was told a story that he was found

23
 24 ³⁵ The record appears to contradict this contention. On July 28, 1992, prior to the
 25 commencement of the penalty phase proceedings, counsel and the trial judge discussed
 26 the information Dr. Cermak reviewed in rendering his opinions, which included witness
 27 interviews. (See RT 5241A.) Defense counsel indicated that they provided the
 28 prosecution with copies of these materials, and specifically noted that: “[t]here were two
 people, Mr. Abata and Ralph Roybal, Mr. Roybal’s brother, who were interviewed by
 our office, but we do not intend to call as witnesses, so they have not been previously
 turned over because they were not going to be witnesses, however, their interviews were
 submitted to Dr. Cermak, along with several other family members whose interviews
 were already turned over or friends of the family whose interviews have previously been
 turned over.” (RT 5241A-42A.)

1 floating in a tub in a river, which he believed until age 14, while, again, the real story
 2 was that Petitioner's father was supposedly from Mexico. (Id. at 26-27.) Frank
 3 reiterated the incident he related at trial concerning Petitioner's fall out of his crib as a
 4 baby. (Id. at 27.) Frank again detailed his mother and Dewey's drinking, and added that
 5 his mother sold Frank's silver dollar good luck charm to buy food; Frank was angry that
 6 she deeded the house to buy liquor but not food. (Id.) Frank discussed the cramped
 7 living conditions at home, adding that he left home under the age of 18 to join the
 8 military and waited until his mother was drunk to get her signed permission. (Id. at 28.)
 9 Before Frank left home, none of his siblings were into drugs or alcohol, but after
 10 returning on leave, his brothers and sisters were using drugs and drinking heavily. (Id.)
 11 Frank further discussed the alcoholism, violence, and drug use pervasive in his extended
 12 family and neighborhood and that many of the people he and Petitioner grew up with
 13 were either dead or recently out of prison. (Id. at 29-30.) Frank also added that the first
 14 time he spoke to Petitioner's attorneys was the day he testified at trial.³⁶ (Id. at 30.)

15 Sylvia Sanchez, Petitioner's maternal cousin, stated that her family lived close to
 16 Petitioner's growing up, and several of her siblings died of alcoholism. (Ex. 7,
 17 Lodgment No. 134 at 41.) Sanchez grew up in an abusive family and her father was an
 18 alcoholic. (Id.) In Sanchez's opinion, Petitioner's mother "was a mean mother who I
 19 believe did not love her children," and she heard Stella say she did not like Petitioner,

20
 21 ³⁶ Frank Orozco does not clarify whether he first spoke to trial counsel just prior
 22 to his guilt phase testimony on July 7, 1992, or his penalty phase testimony in August
 23 1992. Regardless, this assertion is not supported by the record, as he testified at the
 24 preliminary hearing in Petitioner's case, which was held in July 1991, and was cross-
 25 examined by, and ostensibly spoke to, trial counsel at that time. (PRT 116-119.)
 Moreover, during the guilt phase, Frank testified that defense counsel asked him
 questions at the preliminary hearing and that only defense counsel had asked him about
 Petitioner's condition on June 9, the night of the murder. (RT 4623.) The transcript
 also includes the following exchange, in which Frank states that he also spoke to defense
 counsel prior to the preliminary hearing:

26 Q: Prior to the preliminary hearing, did you tell anyone that you had
 gone to your brother's room to check on him at 11 o'clock or 10
 o'clock June 9?

27 A: I told the - - one of the lawyers for the defense.

28 Q: Okay. So you remember telling one of the attorneys for the defense?

A: Yes.

(Id.)

1 who Stella used to call a “Mexican wetback.” (Id. at 42.) Sanchez stated that Dewey
 2 was mean and a heavy drinker, and related that: “One day, while I was out with my
 3 cousin Theresa, he beat both of us with a belt because Theresa had not obeyed his order
 4 to stay home.” (Id.) While Ralph was violent, Sanchez stated that Petitioner was
 5 “outgoing and affectionate.” (Id.) Her grandfather, as well as several uncles, were also
 6 heavy drinkers; Sanchez stated there were also several schizophrenics in the family. (Id.)
 7 The defense team did not talk to her, and Sanchez stated she would have been available
 8 to testify. (Id.)

9 Petitioner’s cousin, Jose Alvarez,³⁷ stated that his mother was contacted by
 10 someone from the defense team, but they never called back. (Ex. 2, Lodgment No. 134
 11 at 24.) Alvarez’s father was a heavy drinker, violent, and beat his sisters. (Id. at 22.)
 12 Alvarez also noted that numerous relatives were alcoholics and that many died of
 13 alcoholism, while several others died of heart attacks, AIDS, or committed suicide. (Id.
 14 at 22-24.) Alvarez also detailed that several extended family members had committed
 15 violent or criminal acts, such as murder, attempted murder, attempted rape, and
 16 prostitution. (Id. at 22-24.) Alvarez started to drink and sniff paint when he was a
 17 teenager; he did not want to die and stopped drinking after finding religion, stating that:
 18 “Many of the young men that Rudolph and I grew up with and drank and sniffed paint
 19 with are now dead,” and that several had been murdered. (Id.)

20 Petitioner also submits a declaration and social history prepared by psychologist
 21 Katherine DiFrancesca, Ph.D. (Exs. 1, 13, Lodgment No. 134 at 1-21, 129-35.) Dr.
 22 DiFrancesca interviewed Petitioner on several occasions, reviewed the Alvarez, Orozco,
 23 Romero, Roybal, and Sanchez declarations, as well as reviewed the trial testimony of

24
 25 ³⁷ The record reflects that the defense was aware of a potential witness named Jose
 26 Alvarez, as on May 19, 1992, the defense filed a request for Mr. Alvarez’s attendance
 27 at Petitioner’s trial, stating that Alvarez, who lived in Santa Fe, New Mexico, was “a
 28 necessary and material witness for the Defendant in the above-entitled case because he
 was a percipient witness to facts at issue in the penalty phase proceedings,” and a
 subpoena dated May 26, 1992 was issued ordering Alvarez’s appearance on June 22,
 1992, the date on which penalty phase proceedings commenced in Petitioner’s case. (CT
 1598-99, 1605.) However, the record does not offer enough information to conclusively
 determine whether these references are to the same individual.

Petitioner's mother Stella and brother Frank. (Id. at 3.) She detailed Petitioner's upbringing, his mother's drinking, the violence in his family and environment, maternal rejection, poverty, lack of education, his substance use and abuse, fights, and a car accident which put him at risk for brain damage. (Id.) She outlined several differences between Petitioner's upbringing and those around him, such as his brother Frank or sister Theresa, in that Petitioner was rejected and not wanted, had learning difficulties, and was more abused than his siblings. (Id. at 17.)

C. Discussion

Trial counsel indicate that they did not recall any strategic or tactical reason for not presenting a more "complete social history," such as that outlined in Dr. DiFrancesca's declaration. (Exs. 66, 67, Lodgment No. 143 at 6, 15-17.) Specifically, counsel Kathleen Cannon, who handled the penalty phase presentation, states:

I do not recall any strategic or tactical reason not to prepare and present a more complete social history that would have shown the pervasive effect of alcoholism and poverty on all of the petitioner's immediate and extended family. Such evidence could have shown how there was no place for the petitioner to escape from the abusive and destructive forces of his childhood and young adulthood.

(Id. at 13-14.) She also indicates that:

It is my opinion that had a mitigation specialist or similarly trained expert been retained early in the preparation of the defense, this information would have been obtained and could have been presented at the penalty phase. Although we presented evidence of an abusive upbringing and maternal neglect and use of alcohol and drugs, there was further evidence that could have been presented that would have been more persuasive in sparing Mr. Roybal's life by showing the pervasive environment of violence, alcoholism, physical, emotional, and substance abuse that affected all in [sic] his family members except his older adopted brother, Frank Orozco, who managed to get out by joining the Marines.

(Id. at 16.) Campbell adds that: "Funds were not approved for a mitigation specialist or similarly trained expert, other than an investigator. I believe it was the policy of the Public Defender's Office that investigators are sufficient and mitigation specialists unnecessary. I believe that a mitigation specialist or similarly trained social worker would have been helpful to the defense." (Id. at 2-3.)

1 But, as Petitioner and trial counsel concede, the defense presented several relatives
2 as witnesses to testify about Petitioner's social history, including his upbringing,
3 maternal rejection, poverty, substance abuse, alcoholism, abuse, and learning difficulties.
4 Dr. Cermak also testified about Petitioner's background and upbringing, in addition to
5 his testimony about Petitioner's mental condition and brain abnormalities.

6 Petitioner cites to the prosecutor's closing argument, including the prosecutor's
7 contention that Frank's testimony was not believable because help could have been
8 available from the community, that Frank's testimony only detailed abuse until Frank left
9 home when Petitioner was 14, and that the defense was attempting to blame Stella but
10 did not produce corroboration, as well as the testimony of Dr. Bucky challenging the
11 defense's claim that the alcoholism was genetic. (FAP at 252.) Petitioner argues that
12 the five declarations "would have addressed each of these points." (Id.)

13 Reviewing courts "must indulge a strong presumption that counsel's conduct falls
14 within the wide range of reasonably professional assistance." Strickland, 466 U.S. at
15 689. "A fair assessment of attorney performance requires that every effort be made to
16 eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's
17 challenged conduct, and to evaluate the conduct from counsel's perspective at the time."
18 Id. It is clear that Petitioner's contention, that these new declarations rebut the
19 prosecution's arguments, is offered in hindsight. The record shows that counsel
20 investigated Petitioner's background and interviewed a significant number of family
21 members, counselors, and former employers. Counsel presented that social history
22 evidence at trial, and called witnesses to testify about Petitioner's impoverished,
23 neglected and abusive upbringing, his substance abuse, and his work ethic.

24 Much of the evidence Petitioner now presents is cumulative. For instance,
25 Petitioner asserts that the additional information presented during post-conviction
26 proceedings "would have shown the pervasive and pernicious effect alcoholism had on
27 the family." (FAP at 251.) The record reflects that counsel was aware of the family
28 history of alcoholism, given the testimony of Dr. Cermak, the questions defense counsel

1 posed to Dr. Bucky, and Dr. Koshkarian's report, which indicates that "[t]here was a
2 strong family history of alcoholism on his mother's side of the family and a maternal
3 grandfather plus three cousins died from complications of alcohol." (Ex. 11, Lodgment
4 No. 134 at 121-22.) Several penalty phase witnesses testified about the alcoholism in
5 Petitioner's family. Stella testified that her own father, Petitioner's maternal grandfather,
6 was an alcoholic who never worked, and it was up to her mother to support the family.
7 (RT 5541-46.) Cousin Eddie Montoya testified that when he socialized with Stella, they
8 drank. (RT 5630.) Frank went into great detail about their mother and stepfather's
9 drinking, fights, neglect and abuse and testified that their extended family "were all
10 alcoholics." (RT 5855-61, 6011.) Dr. Cermak discussed Stella's alcoholism, including
11 the fact that she drank while pregnant with Petitioner and throughout his childhood,
12 described Petitioner's family as an "alcoholic family," and discussed the potential
13 genetic connection to Petitioner's own substance abuse. (RT 6074-79, 6087-88.) Even
14 Dr. Bucky agreed that it "certainly" would be significant that Stella's father, Petitioner's
15 grandfather, died of alcoholism, and he too noted the history of alcoholism in Petitioner's
16 family. (RT 6312, 6319.) The jury was well aware that substance abuse was a problem
17 throughout Petitioner's immediate and extended family. The proposed testimony
18 identifying other individuals in Petitioner's extended family who were alcoholics only
19 offers additional details on a matter that was already presented to the jury. See Wong,
20 558 U.S. at 22-23 (trial counsel is not required to present cumulative mitigating
21 evidence). While Frank's post-conviction declaration largely repeats his trial testimony,
22 he provides some additional details, such as that their maternal grandfather sold his ranch
23 for a car, and that Frank, who was underage at the time he wanted to join the military,
24 waited until Stella was drunk to ask her to sign the enlistment papers. But Petitioner has
25 not shown that counsel was deficient in failing to uncover these details, as Frank does
26 not indicate whether he ever mentioned these incidents to trial counsel, and in any event,
27 the information merely offers additional ancillary details on subjects that were already
28 before the jury. See id.

1 Both Frank and Stella Orozco testified about the family's impoverished situation,
2 and Frank discussed the poverty in their surrounding community, as well as noting that
3 their family was poorer than the other families. Additional details about the violence and
4 substance abuse throughout Petitioner's community may have provided a fuller picture
5 of his surrounding environs, but in light of the deference required in evaluating counsel's
6 performance from their perspective at the time of trial, the Court cannot conclude that
7 trial counsel acted unreasonably in failing to uncover and present this additional
8 evidence. See Bobby v. Van Hook, 558 U.S. 4, 11 (2009) ("[T]here comes a point at
9 which evidence from more distant relatives can reasonably be expected to be only
10 cumulative, and the search for it distractive from more important duties.") Deciding to
11 present the testimony of more immediate relatives such as his mother and brother,
12 powerful testimony which starkly illustrated Petitioner's background and the
13 circumstances of Petitioner's upbringing, and to not seek out additional evidence about
14 his more distant relatives and community fell "well within the range of reasonably
15 professional judgments." Strickland, 466 U.S. at 699.

16 The fact remains that trial counsel investigated and presented numerous witnesses
17 to testify in mitigation about Petitioner's background and upbringing. The trial judge
18 acknowledged at sentencing that there was "lots of evidence that was presented under
19 the (k) factor" during the penalty phase. (RT 6761.) The judge reviewed the evidence
20 that had been presented to the jury, and noted that Petitioner was "born into a family that
21 was dysfunctional," that Petitioner's "mother was a prostitute," his "father left at about
22 the time of his birth, abandoned him," and that "[h]is stepfather, Dewey, was abusive."
23 (RT 6762.) The judge also acknowledged that Petitioner was "called a wetback, ignored,
24 unloved, and the like," and that he "ended up as a transient worker, an alcoholic and
25 dependent on drugs." (Id.) Thus, most of the subject matter Petitioner discusses in this
26 claim was already presented during the penalty phase proceedings, and counsels'
27 performance in presenting Petitioner's social history stands in contrast to other cases in
28 which trial counsel's performance was found inadequate. See e.g., Wiggins, 539 U.S.

1 at 515 (trial counsel introduced evidence that someone other than the petitioner
2 committed the murder, argued that the defendant had no prior convictions, and while
3 promising to introduce information on the petitioner's background during opening
4 statements to the jury, "counsel introduced no evidence of Wiggins' life history" at the
5 penalty phase); Rompilla v. Beard, 545 U.S. 374, 390 (2005) (counsel failed to obtain
6 school records, juvenile and adult correctional records, failed to investigate the
7 petitioner's alcohol abuse, despite indications that he was drinking at the time of the
8 offense, and failed to review the file on his prior conviction, which the prosecution
9 intended to use as an aggravator and which contained "a range of mitigation leads that
10 no other source had opened up.")

11 This claim also fails because Petitioner is unable to demonstrate that he suffered
12 actual prejudice from these and the other instances of alleged deficient performance, as
13 discussed below in section C.5. See Strickland, 466 U.S. at 697; Wiggins, 539 U.S. at
14 534 ("In assessing prejudice, we reweigh the evidence in aggravation against the totality
15 of the available mitigating evidence.") Claim 7 fails even under a de novo review.
16 Petitioner is not entitled to habeas relief on Claim 7.

17 **4. Claim 8**

18 Petitioner asserts that trial counsel rendered prejudicially deficient performance
19 in failing to present available detailed evidence from treatment and correctional facilities
20 that demonstrated his "positive institutional adjustment." (FAP at 263.)

21 Petitioner raised this contention as part of Claim 1 in the state habeas petition.
22 (Lodgment No. 133.) The California Supreme Court rejected the claim on the merits
23 without a statement of reasoning. (Lodgment No. 144.)

24 Petitioner's institutional history was referenced at the penalty phase, but only in
25 relation to his repeated stints in alcohol and drug abuse treatment programs. Santa Fe
26 Recovery of Alcoholics ["RAP"] program worker Lucy Madrid, who was Petitioner's
27 counselor starting in 1976, stated that he went through portions of the program about
28 twenty times over ten years and made efforts to learn during his time there. (RT 5700-

1 11.) At one point, Madrid spoke to Petitioner about the possibility that he could become
2 a counselor. (RT 5714-15.) Madrid acknowledged that Petitioner had been referred to
3 RAP through the court system. (RT 5737.) Nan Busby, the director of Seadrunar, a
4 substance abuse treatment center in Seattle, stated that Petitioner was a client in that
5 program for approximately two years, between June 1987 and February 1989. (RT 5758-
6 59.) Petitioner completed and repeated portions of the program over several years, and
7 relapsed several times. (RT 5773.) Busby explained that the first phase had greater
8 structure and close supervision, less so in the second phase or aftercare; Petitioner had
9 a “hard time” in the second phase. (RT 5774-84.) Busby recounted several relapses and
10 returns to the program, stating that Petitioner’s probation officer authorized Seadrunar
11 to accept Petitioner into the program again. (RT 5786-95.) Petitioner came to the
12 program while on probation for four felony offenses; Seadrunar had a copy of
13 Petitioner’s criminal record. (RT 5806-08.) Seadrunar’s intake records reflected that
14 Petitioner stated he had gone through various treatment programs fourteen times, eight
15 through RAP, and three each with two other centers in New Mexico (ATU and Rio
16 Grande), and “has been court committed to treatment all but four times”; Busby
17 explained that a court commitment “means in lieu of incarceration they can come to a
18 treatment program.” (RT 5812-13.) With respect to one of Petitioner’s relapses, Busby
19 was only aware of what Petitioner told them, which was that he drank a six pack of beer.
20 (RT 5827.)

21 Petitioner contends counsel should have presented more evidence of his positive
22 institutional history. For instance, Petitioner states that his Seadrunar records do not
23 reflect any violent or disruptive behavior; the only noted violations are for drinking beer
24 and cocaine use. (FAP at 263-64, citing Ex. 26.) Petitioner also points out that his
25 records from the Las Lunas facility show no attempted escapes, no misconduct, and good
26 behavior; records note only one disciplinary report, for refusing to provide a urine
27 sample. (FAP at 264, citing Ex. 29.) Petitioner’s San Diego County correctional records
28 reflect one complaint by Petitioner about a lockdown of his cell block and a subsequent

1 refusal to open his door and come out; he was later classified a risk due to his death
2 sentence. (FAP at 264, citing Ex. 30.) Petitioner also cites to numerous other available
3 records from correctional institutions, recovery programs, and hospitals. (FAP at 265.)

4 Craig Haney, Ph.D., a professor who specializes in “psychology and law,”
5 examined Petitioner’s records and concluded as follows:

6 Mr. Roybal had a long institutional record that was amassed because of his
7 life-long struggle with drug and alcohol addiction. Virtually every one of
8 his crimes was in some direct way related to his intoxication or the need to
9 maintain a drug addiction. Yet his institutional record stood in stark
10 contrast to his problematic life in free society. Rudy Roybal had an
11 excellent record of institutional adjustment, one that he had achieved in a
12 variety of institutional settings, including various drug and alcohol
treatment programs, a residential therapeutic community, and several New
Mexico penitentiaries. Moreover, given the way that he responded
positively to more structured institutional settings, there was every reason
to believe that he would make an excellent adjustment to prison— especially
to a maximum security Level IV prison of the sort a life without parole
sentenced prisoner is sent to in California.

13 (Ex. 22, Lodgment No. 135 at 321-22.)

14 Dr. Haney found a “pattern” to Petitioner’s participation in recovery programs and
15 other admissions, as Petitioner participated but continued to drink, and was often
16 removed from the programs, or “[a]lternatively, he would complete some aspects of the
17 program but, as soon as the structured and regulated nature of the confinement was
18 relaxed, he relapsed and his drinking problems surfaced again.” (*Id.* at 323.) At the time
19 of his 1992 trial, Dr. Haney noted that Petitioner was “middle-aged by prison standards,
20 and certainly on the verge or past the age at which the overwhelming majority of
21 prisoners ‘age out’ and become rule abiding and conforming prisoners.” (*Id.*) Similarly,
22 Dr. Koshkarian stated in his 1992 evaluation of Petitioner that: “If placed in prison,
23 based on his personality and past behavior he would probably lead a quiet, productive,
24 and incident-free existence.” (Ex. 11, Lodgment No. 134 at 124.) Attorney Cannon
25 reviewed Dr. Haney’s declaration and stated that:

26 All of the records attached as exhibits to Dr. Haney’s declaration were
27 documents either provided in discovery prior to trial or collected by the
28 defense in preparation for trial. There was no tactical or strategic reason to
not hire an expert on institutional adjustment to explain to jurors that Mr.
Roybal could and would perform well in institutional settings. Dr. Haney’s

1 opinion that Mr. Roybal had an ‘excellent record of institutional
2 adjustment, one that he had achieved in a variety of institutional settings,
3 including various drug and alcohol treatment programs, a residential
4 therapy community, and several New Mexico penitentiaries’ could have
5 been critical evidence to present in a penalty phase. I recall that during
6 deliberations the jurors asked for evidence of the petitioner’s institutional
7 history either in jail or prison prior to the commission of the offense. I do
8 not recall any strategic reason not to present this obvious evidence in
9 mitigation that, as it turned out, jurors sought to hear.

10 (Ex. 67, Lodgment No. 143 at 17-18.)

11 While it appears that trial counsel concedes that they did not have a tactical reason
12 for presenting expert testimony about Petitioner’s institutional history, the defense called
13 Nan Busby and Lucy Madrid to testify about Petitioner’s performance in treatment. The
14 general tenor of the testimony was similar to Haney’s conclusions, that Petitioner made
15 an effort to obtain treatment, that he did better with a structured program, and that he
16 relapsed when the structure was relaxed. In closing arguments, the defense repeatedly
17 referenced Petitioner’s struggles with substance abuse, arguing that his prior sentencing
18 judge, who sent Petitioner to a treatment program, appeared to have recognized that
19 Petitioner “has a problem that needs to be treated. And unless that problem is treated,
20 he will continue. [¶] And in order to protect society, not just today, but tomorrow and
21 tomorrow, we need to get this man in a long-term live-in treatment program, with the
22 threat of prison over his life.” (RT 6490.) The defense argued that the judge “saw there
23 was an underlying problem, not just an evil person, but someone who needed serious,
24 serious, help.” (RT 6490-91.) The defense also asserted that “when he was in the
25 program where that structure was given, he operated within the guidelines. He tried.
26 Yes, he marked time, but he didn’t leave. He also showed growth.” (RT 6525.)

27 The record also reflects that trial counsel made specific choices on what questions
28 to ask, and what evidence to elicit, on this subject in order to avoid potential cross-
examination on future dangerousness. At trial, the prosecutor pointed to defense
counsel’s questions to Dr. Cermak about Petitioner’s prognosis with respect to treatment
for his substance abuse, and stated: “I would like to ask the doctor whether he can guess
whether the defendant will kill again, and the area of future dangerousness is not - - but

1 I believe they've broached the subject by trying to get the doctor to guess at what the
2 future is going to be like for this guy, whether in custody or not, or in custody." (RT
3 6196.) Defense counsel objected, arguing that their questions were specifically directed
4 towards Petitioner's prospects for successful treatment of his substance abuse, rather
5 than his potential for future violence: "So my questions were specifically tailored toward
6 his chemical abuse, could he ever develop himself to the point where he could be free
7 of chemical abuse. . . . I did not ask whether he was a danger, if he's a dangerous person
8 out of custody, and the Court knows the case law is very, very clear about the prospect
9 of future dangerousness. It is not appropriate and can't be talked about in trial. This
10 doctor is not talking about future dangerousness. He's talking about if there was ever
11 any possibility for Rudolph Roybal." (RT 6196-97.) The trial court denied the
12 prosecution's request to ask the proposed question. (RT 6197.) This exchange reflects
13 that counsel's decision on how to present this evidence was strategic.

14 The prosecution also tried to introduce evidence about Petitioner's possession of
15 a simulated weapon during his time at Seadrunar, and asserted that the defense placed
16 Petitioner's character in issue through their presentation of witnesses. (RT 5840-46.)
17 Defense counsel responded that: "From the beginning I've indicated to the court and
18 prosecution very clearly. We have very specific issues. [¶] Character in the program.
19 You want to impeach him about what's wrong with him in the program, impeach him
20 with his behavior in the program. Character at work, how he worked for Anthony
21 Roybal. You can talk about how he worked for Anthony Roybal. But we have been
22 tailoring this very narrowly." (RT 5845.) The trial court denied the request, and held
23 that "the defense has not opened up his character for violence or for the use and other
24 possession of weapons." (RT 5846-47.) In particular, the Court noted that the defense
25 had declined to call the witness who the prosecution could have questioned about this
26 incident, and held that the matter was therefore moot. (RT 5847.) These exchanges also
27 reflect that counsel had a strategic and tactical approach concerning this evidence in light
28 of the potential for the introduction of rebuttal evidence.

1 Petitioner concedes that trial counsel presented some of this evidence in mitigation
2 but argues that “[t]rial counsel failed to present any of these institutions- related themes
3 in any coherent or remotely effective way. Although there was an occasional witness
4 called who mentioned one or another institutions-related issue in passing, trial counsel
5 never structured or presented this testimony in a manner that would have allowed jurors
6 to understand Mr. Roybal’s institutional history in a meaningful way or to grasp how it
7 helped to explain and mitigate his behavior outside of institutions.” (FAP at 268.)

8 “Judicial scrutiny of counsel’s performance must be highly deferential.”
9 Strickland, 466 U.S. at 689. Given Strickland’s dictate that a reviewing court “must
10 indulge a strong presumption that counsel’s conduct falls within the wide range of
11 reasonable professional assistance,” the Court is not persuaded that trial counsel was
12 deficient in presenting the mitigation in this manner. See id. Presenting testimony and
13 argument on Petitioner’s attempts at recovery, rather than detailing his largely positive
14 correctional history, focused the jury’s attention on Petitioner as an individual with a
15 substance abuse problem in need of treatment, rather than allowing for further discussion
16 of his criminal activity and subsequent incarcerations.

17 Petitioner contends that “[t]he prejudice resulting from the failure of trial counsel
18 to present this critical mitigating evidence became apparent when the jury requested
19 information concerning Mr. Roybal’s prison and jail records prior to the commission of
20 the offense, indicating that the jury on its own believed this was a critical fact in its
21 decision as to whether to impose a sentence of death or life without parole.” (FAP at
22 269.) After reviewing the record, it appears that the jury’s request and subsequent
23 discussion between the Court and counsel also support a conclusion that counsel’s
24 decisions in this regard were tactical.

25 During deliberations, the penalty phase jury submitted the following question to
26 the court: “From the record we want to know if Roybal has ever been incarcerated in a
27 prison/jail prior to the murder, and if so, how long?” (RT 6570, CT 2188.) The trial
28 judge and counsel engaged in an extended discussion on how to address that question,

1 and the judge stated: "I don't think there's anything directly in evidence about if he's
2 ever been incarcerated at all before, at all." (RT 6571.) Defense counsel added, to
3 agreement from all parties, that: "I think the only records that have been discussed were
4 the Las Lunas Prison records, and they were subsequent." (RT 6571-72.) The parties
5 were unable to reach a stipulation, and the trial judge informed the jury as follows:
6 "After conferring with the attorneys, I need to tell you that I can't answer the question.
7 There is no evidence before this jury, even in the penalty phase, as to whether the
8 defendant did or did not ever serve time in prison and/or jail," and admonished that: "I
9 have warned you before that you're not to speculate as to items as to which there is no
10 evidence, so it would be incorrect for you to assume or speculate that he had or had not
11 been so incarcerated as your question suggests." (RT 6581-82.)

12 The defense later reconsidered, and the parties entered into a stipulation. (RT
13 6592-95.) The trial court informed the jurors that:

14 First, prior to the murder, the defendant, Mr. Roybal never served time in
15 state prison on a state prison commitment. [¶] Second, and you've already
16 heard this evidence, I think it was in the 1986 proceedings on the four
17 felonies, the defendant did serve, or probably a better term would be
18 'spent', 60 days in a state prison diagnostic facility, but not under a state
19 prison commitment. You've heard evidence of that before. So to answer
20 your question on the second part, he did spend 60 days in a state prison
21 facility, but only under a diagnostic study. [¶] All right. And third, the
22 longest period of confinement that the defendant has experienced prior to
23 the murder was a county jail sentence, which he served, which totaled 364
24 days gross time. Gross time simply means that's what the judge
25 pronounced. The exact amount of time that he actually served is unknown
26 or undetermined at this point.

21 (RT 6592-93.)

22 The record also reflects that the jury was already aware that Petitioner had been
23 arrested on multiple prior occasions, had violated parole, and had a juvenile history,
24 although the jury had been instructed that such evidence was not to be considered in
25 aggravation. (RT 6139.) Six prior felony convictions had been alleged in aggravation,
26 but again, the jury was only provided limited information on prior incarcerations.

27 Respondent argues that presenting additional information about Petitioner's past
28 institutional behavior would have opened the door to incidents in which he did not

1 follow the rules, citing several incidents while Petitioner was in treatment or in
2 correctional facilities, and “supports counsel’s tactical decision.” (Ans. at 72.)
3 Petitioner maintains that Respondent fails to point to any evidence of future
4 dangerousness that would have rebutted the value of the mitigation. (FAP at 271,
5 Traverse at 87.)

6 While counsel states that she does not now “recall any strategic reason” for not
7 presenting the institutional history in the manner now advanced by Petitioner, this does
8 not mean that the decisions made at the time of trial are not entitled to deference. See
9 Strickland, 466 U.S. at 689. “A fair assessment of attorney performance requires that
10 every effort be made to eliminate the distorting effects of hindsight, to reconstruct the
11 circumstances of counsel’s challenged conduct, and to evaluate the conduct from
12 counsel’s perspective at the time.” Id. Here, counsels’ decisions concerning how to
13 present the penalty phase evidence were made to avoid areas of cross-examination or
14 prevent the introduction of certain evidence in rebuttal, and were tactical.

15 Claim 8 also fails because Petitioner is unable to demonstrate that he suffered
16 actual prejudice from this and his other allegations of deficient performance, as discussed
17 in section C.5. See Strickland, 466 U.S. at 697; Wiggins, 539 U.S. at 534 (“In assessing
18 prejudice, we reweigh the evidence in aggravation against the totality of the available
19 mitigating evidence.”). Claim 8 fails even under a de novo review. Petitioner is not
20 entitled to habeas relief on Claim 8.

21 **5. Penalty Phase Prejudice**

22 As discussed above, the Court rejects Petitioner’s assertions regarding the alleged
23 deficiencies in trial counsel’s penalty phase performance, as the record reflects that
24 counsel investigated Petitioner’s social history by interviewing witnesses, gathering a
25 substantial amount of background records and presenting numerous witnesses at trial,
26 as well as investigating and presenting evidence that Petitioner suffered from organic
27 brain damage. The record also reflects that the decisions made with respect to the
28 introduction of Petitioner’s institutional history appear tactical in nature and were

1 calculated in an effort to avoid potentially damaging areas of cross examination or
2 rebuttal. Even were Petitioner able to demonstrate that counsel was deficient in one or
3 more of the respects alleged, his claims of ineffective assistance of counsel at the penalty
4 phase also fail for lack of prejudice. See Strickland, 466 U.S. at 687 (a petitioner
5 asserting a claim of ineffective assistance of counsel must show both deficient
6 performance and prejudice).

7 Thus, as an alternative ground for the result, the Court evaluates the potential
8 prejudicial impact of counsels' alleged deficient performance at the penalty phase by
9 reweighing the evidence in mitigation and aggravation. See Wiggins, 539 U.S. at 534
10 ("In assessing prejudice, we reweigh the evidence in aggravation against the totality of
11 the available mitigating evidence."), see also Williams, 529 U.S. at 397-98, Wong, 558
12 U.S. at 26 ("[T]he reviewing court must consider all the evidence-the good and the bad-
13 when evaluating prejudice."), citing Strickland, 466 U.S. at 695-96.

14 At trial, Petitioner's mother and brother discussed Petitioner's upbringing,
15 including his mother's alcoholism throughout her pregnancy and his childhood, her
16 prostitution and neglect of Petitioner, abuse by his stepfather, and Petitioner's own early
17 use and abuse of alcohol and drugs. Petitioner's birth was the result of his mother's
18 liaison with another man that broke up her marriage and led her to resent Petitioner.
19 Petitioner never knew his father, but his mother nicknamed Petitioner "Mojo," or
20 "wetback," given his father's background. Two of Petitioner's prior substance abuse
21 counselors testified about Petitioner's efforts in treatment and his extended battle with
22 alcoholism and substance abuse, while two of Petitioner's former employers found
23 Petitioner to be a hard and dependable worker. As discussed previously, Dr. Cermak
24 also testified at length about Petitioner's background and upbringing, substance abuse,
25 organic brain damage, blackouts, and the possibility of fetal alcohol effects from his
26 mother's alcohol abuse.

27 As discussed in Claims 4 through 8, Petitioner now alleges that counsel was
28 deficient for failing to present several additional avenues of mitigation, as well as failing

1 to present additional evidence with respect to Petitioner's background and mental health
2 that would have provided the jury with a more complete picture of Petitioner's
3 upbringing, community, and brain deficiencies. Petitioner asserts that evidence of his
4 lack of flight from the minimum security facility in New Mexico would have supported
5 a defense argument that he did not recall the murder and had suffered a blackout that
6 evening. Petitioner also contends that his positive institutional record and expert
7 testimony about his anticipated adjustment to prison would have provided additional
8 evidence in favor of a life sentence. Petitioner had a generally good institutional record
9 with only minor infractions during prior incarcerations, and expert Craig Haney states
10 that Petitioner was likely to have made an excellent adjustment to life in prison.

11 Several post-conviction expert evaluations and testing results provide additional
12 support for a diagnosis of organic brain damage and medical records detail a larger
13 number of head injuries Petitioner suffered in the years prior to the murder than the few
14 injuries discussed at trial. Dr. Cermak, who testified at Petitioner's penalty phase
15 proceedings, states that the new results would have changed the focus of his testimony
16 from Petitioner's personality to the evidence of organic brain damage, and that the
17 diagnosis based on this evidence would have withstood rebuttal testimony about anti-
18 social personality disorder.

19 Several family members, including his sister, cousin, and aunt, detail abuse and
20 alcoholism throughout Petitioner's extended family and community. Petitioner's brother
21 Frank, who testified at trial, discusses more of the family history, such as his
22 grandfather's alcohol abuse as well as other incidents with respect to their mother's
23 alcoholism, and the poverty, alcoholism, and violence throughout their community.

24 In aggravation, the circumstances of the crime were particularly brutal and cruel.
25 Yvonne Weden, an elderly woman, was attacked at night in her own home, robbed and
26 killed for her jewelry. She suffered over a dozen stab wounds to her neck and chest, and
27 her throat was slit. The stab wounds penetrated her lung, damaged her ribs, hit her aorta,
28 and the wounds to her neck were multiple and severe, severing her voice box. She also

1 suffered numerous bruises and contusions, and her cause of death was lack of oxygen
2 and loss of blood. Petitioner knew the elderly victim, as he had done yard work for her,
3 and knew her husband worked nights. The day after the murder, Petitioner left
4 California and went to his mother's home in New Mexico, where he hid the jewelry in
5 his mother's backyard. When questioned later by police, Petitioner lied and failed to
6 mention that he had been in California. The jury found two special circumstances to be
7 true- murder in the commission of a robbery and murder in the commission of a burglary.
8 The jury heard evidence of four prior incidents of violent criminal activity, and that
9 Petitioner had suffered six prior felony convictions.

10 Considering all of the evidence in mitigation, both that presented at trial as well
11 as the additional test results, evaluations, declarations, and arguments now offered, and
12 reweighing it against the evidence in aggravation, Petitioner fails to demonstrate "there
13 is a reasonable probability that, but for counsel's unprofessional errors, the result of the
14 proceeding would have been different." Strickland, 466 U.S. at 694.

15 Petitioner's lack of an attempt to escape from a minimum-security facility weeks
16 or years after the murder could conceivably allow the defense to argue that Petitioner did
17 not recall the murder. But this argument would have been of slight value given the other
18 evidence showing Petitioner's awareness of the situation, including hiding the fact that
19 he had been in California, as well as his possession of jewelry from the victim's home
20 and his attempts to hide that jewelry.

21 Evidence of Petitioner's positive institutional record, and accompanying expert
22 testimony that he would make a good adjustment to prison, could have been somewhat
23 favorable to Petitioner but would have likely opened the door to rebuttal with incidents
24 of rule breaking that would have, at the very least, dulled the positive impact of such
25 evidence. See People v. Rodriguez, 42 Cal. 3d 730, 792 n. 24 (1986) ("[T]he scope of
26 rebuttal must be specific, and evidence presented or argued as rebuttal must relate
27 directly to a particular incident or character trait defendant offers in his own behalf.")
28 Had the defense called an expert or other individuals to testify about Petitioner's positive

1 prison history and likelihood of good future conduct in prison, it appears that several
2 incidents could have been discussed in rebuttal. As Respondent outlines:

3 Roybal's records from the New Mexico State Hospital show that he drank
4 while admitted to the Alcoholism Treatment Unit (ATU), was observed
5 drunk at the treatment unit, and was discharged from ATU for breaking the
6 rules. (LD 135, Vol. 2, Ex. 17 at 276, Ex. 18 at 285.) Roybal also engaged
7 in criminal behavior while in ATU at the New Mexico State Hospital. After
8 admission to ATU in 1983, Roybal was arrested and jailed on a burglary
9 charge while on a week-end pass. (LD 135, Vol. 2, Ex. 19 at 292.) In
10 1990, the New Mexico Corrections Department noted in a custody
classification evaluation that Roybal had probation violations pending. (LD
11 135, Vol. 2, Ex. 23 at 442.) On October 30, 1990, a judge of the New
12 Mexico District Court ordered Roybal "unsatisfactorily discharged" from
13 probation. (LD 135, Vol. 2, Ex. 23 at 479.) In 1991, Roybal was written
14 up for violating New Mexico Correctional Facility policy for refusing to
15 submit a urine sample. He was referred to a disciplinary officer who found
16 Roybal guilty of the misconduct. (LD 135, Vol. 2, Ex. 23 at 531-35.)

17 (Ans. at 72.) As noted above, there is also the 1989 incident report from Seadrunar
18 where Petitioner admitted using drugs, aborted treatment rather than return, and a gun
19 was found among his personal items. (Ex. 26, Lodgment No. 136 at 758-62.) Seadrunar
20 personnel reported the program termination, drug use, and gun incident to Petitioner's
21 supervising officer in Washington State, and action was taken in Washington and New
22 Mexico to revoke his probation. (Id.; Ex. 28, Lodgment No. 137 at 940-45.)

23 Petitioner points out that "more structured the setting, the better Mr. Roybal
24 performed," and that the "only incident Respondent can focus on while in a secure
25 setting was a refusal to give a urine sample, hardly what one would call violent behavior
26 indicative of future dangerousness." (FAP at 86.) While this may be the case and would
27 not have precluded a defense argument that he would perform well in a structured
28 setting, the fact also remains that Petitioner also committed a crime while on a weekend
pass from treatment, repeatedly broke rules, and violated his probation- this information
would certainly have had rebuttal value against evidence of good behavior and a
corresponding defense argument that his behavior weighed in favor of a life sentence.

Medical records show that Petitioner suffered a greater number of head injuries
than the ones mentioned at trial, but, again, the jury was aware, through the testimony
of Dr. Cermak and Frank Orozco, that Petitioner had suffered several head injuries in the

1 past. Meanwhile, the new expert declarations and evaluations largely agree with Dr.
2 Cermak's trial testimony that Petitioner suffers from organic brain damage, likely caused
3 from a combination of factors, including head injuries as well as his abuse of alcohol,
4 inhalants, and other drugs. While Petitioner argues that the new evidence provides more
5 definitive support for the diagnosis of organic brain damage, Dr. Cermak apprised the
6 jury that Petitioner suffered brain damage, supported by a discussion of test results.

7 The declarations from Petitioner's sister, brother, cousin, and aunt are in part
8 cumulative to the testimony of Petitioner's brother and mother at the penalty phase—
9 indeed, Frank's declaration repeats in part his trial testimony while adding some details
10 about other incidents, extended family, and individuals in their community. Petitioner's
11 other family members offer additional details about alcoholism, violence, and abuse in
12 Petitioner's extended family and community, such as the fact that numerous extended
13 family members died from diseases related to alcoholism, that several were either victims
14 or perpetrators of violent acts, and that abuse was prevalent throughout Petitioner's
15 extended family. But yet again, the jury was already aware that Petitioner was abused
16 and neglected as a child, that his mother was an alcoholic who drank while pregnant, that
17 Petitioner grew up in an alcoholic family, and that he started to abuse drugs and alcohol
18 at a young age. Moreover, both Frank and Stella Orozco testified about their poverty,
19 and Frank also discussed the fact that while the surrounding community was also poor,
20 his family was significantly more impoverished. The social history evidence Petitioner
21 now offers is largely cumulative to that presented at trial, and, at most, the new evidence
22 only adds slight depth to the evidence already before the jury.

23 When ruling on the defense's post-trial motion to modify the jury's death verdict,
24 the trial judge reviewed the evidence that had been presented to the jury. The judge
25 recognized that "[w]e do have testimony by several experts concerning the defendant
26 having suffered or not suffered or to the extent to which he had suffered from alleged
27 mental deficit, disease or organic brain syndrome" as well as fetal alcohol effects. (RT
28 6748.) The judge also indicated that the jury had been presented with "lots of evidence

1 on this [Cal. Penal Code section 190.3] (h) factor,” including Petitioner’s intoxication
2 and the various diagnoses of the testifying experts. (RT 6755-56.)

3 During the motion hearing, the trial judge reasoned that despite Petitioner’s
4 intoxication and mental condition, he “had the presence of mind to strike out” at the
5 victim, then “had the presence of mind to then go through the house almost
6 systematically looking for other property,” that he “had the presence of mind to leave the
7 Oceanside area later that day, the next day for Albuquerque,” and that he “had the
8 presence of mind to hide the jewelry,” and stated: “I think from all of that, even if he
9 were intoxicated or suffering from some mental disorder or some personality disorder,
10 he knew what he had done.” (RT 6757-58.) The judge reasoned as follows:

11 Accordingly, I would conclude under the (h) factor that even if there were
12 evidence of intoxication, and there is some evidence of that, and evidence
13 of some personality disorder or mental disease or defect, I conclude that it
14 did not impair his ability to appreciate the fact that he had committed a
15 crime or to otherwise prevent him from conforming his conduct to the legal
requirements. [¶] To put it simply, if you know that you have done
something wrong and take steps to hide the fact that you have done
something wrong, you obviously have known that what you did was wrong.

16 (RT 6759.)

17 The trial judge also acknowledged that there was “lots of evidence that was
18 presented under the (k) factor,” such as Petitioner’s dysfunctional family situation,
19 including his mother’s prostitution, his father’s abandonment, and his stepfather’s abuse.
20 Petitioner “was treated by his mother and the males with whom his mother associated
21 with either contempt, was passed off as an unwanted child, called a wetback, ignored,
22 unloved and the like,” and the jury had been apprised of Petitioner’s juvenile legal
23 problems, lack of performance in school, and early abuse of drugs and alcohol. (RT
24 6761-62.)

25 In sum, while Petitioner undoubtedly had a dysfunctional background and
26 upbringing, suffered from a serious substance abuse problem as well as organic brain
27 deficiencies, much of the information Petitioner now offers was presented to the jury at
28 the penalty phase. The jury was aware of the neglect, the abuse, the organic brain

1 damage, and Petitioner's alcohol, inhalant, and drug addiction. The new arguments in
2 mitigation, such as the lack of an escape attempt and positive institutional history, are
3 only of marginal benefit given the facts of the crime and the possibility of cross-
4 examination and rebuttal on Petitioner's prior infractions as well as opening the door to
5 discussion of prior incarcerations that had not been mentioned to the jury.

6 Based on a review of this record, the Court is not persuaded that there is "a
7 reasonable probability" that presenting the additional mitigation evidence would have
8 resulted in a different penalty phase verdict. See Strickland, 466 U.S. at 694, see also
9 Richter, 526 U.S. at 112 ("The likelihood of a different result must be substantial, not
10 just conceivable.") Thus, Petitioner's claims of ineffective assistance of counsel during
11 the penalty phase proceedings fail under a de novo review for lack of prejudice.

12 Petitioner requests an evidentiary hearing on Claims 4 through 8, specifically with
13 respect to: (1) "What information Mr. Roybal's trial counsel had concerning any brain
14 damage Mr. Roybal may have suffered prior to June, 1989"; (2) "What information from
15 family members or others familiar with Mr. Roybal who were alive in 1992 but are now
16 deceased could have been obtained and presented during his trial"; and (3) "Whether the
17 destruction or inability to locate jail or prison records that would show Mr. Roybal's
18 positive institutional adjustment makes it impossible on habeas corpus to show the full
19 extent of his positive institutional adjustment." (Pet. EH Mem. at 11, 13, 15.)

20 Under a de novo review, an evidentiary hearing is warranted if the petitioner: (1)
21 "has alleged facts that, if proven, would entitle him to habeas relief," and (2) "did not
22 receive a full and fair opportunity to develop those facts in a state court." Williams, 384
23 F.3d at 586. As discussed above, Petitioner fails to show that the asserted instances of
24 deficient performance were prejudicial. This Court has thoroughly reviewed the merits
25 of Claims 4-8, including the pleadings and numerous exhibits, and concludes that there
26 is no reasonable probability of a different result at either the guilt or penalty phases. (See
27 Claims 4-8, supra.) Because Petitioner's allegations, even if proven to be true, would
28 not entitle him to habeas relief, the Court need not hold an evidentiary hearing. See

1 Totten, 137 F.3d at 1176 (“[A]n evidentiary hearing is *not* required on issues that can be
2 resolved by reference to the state court record.”). Petitioner is not entitled to habeas
3 relief on Claim 8.

4 **6. Claim 9**

5 Petitioner contends that trial counsel was ineffective for failing to object to the
6 prosecutor’s improper statements during closing arguments, including: (1) erroneous
7 statements about the weighing of aggravating and mitigating evidence, and (2) references
8 to, and recitation of, biblical law.³⁸ (FAP at 272-74.)

9 Petitioner raised this contention as part of Claim 1 in the state habeas petition.
10 (Lodgment No. 133.) The California Supreme Court rejected the claim on the merits
11 without a statement of reasoning. (Lodgment No. 144.) Petitioner previously raised the
12 biblical law aspect of this claim on direct appeal, along with a corresponding claim of
13 prosecutorial misconduct. (See Lodgment No. 123 at 187-98.) The California Supreme
14 Court rejected Petitioner’s claim of ineffective assistance of counsel for failing to object
15 to the prosecutor’s biblical remarks in a footnote to the adjudication of the corresponding
16 claim of prosecutorial misconduct, as follows:

17 FN13 Defendant also argues that his trial counsel’s failure to
18 object to the prosecutor’s remarks violated his right to
19 effective assistance of counsel. He cannot make such a
showing; there was no prejudicial prosecutorial misconduct.

20 Roybal, 19 Cal. 4th at 521.

21 Petitioner argues that the Court should review Claim 9 de novo because “it is
22 impossible to find, beyond speculation, what was the reason for the California Supreme
23 Court’s ‘post card’ denied [sic] of this claim on the merits.” (FAP at 275.) Petitioner
24 asserts that if the California Supreme Court denied this claim on the performance prong,
25 such a conclusion was an unreasonable application of Strickland to the facts, and if the
26 state court denied the claim for lack of prejudice, “such a determination would have been

27
28 ³⁸ In the FAP, Petitioner raised corresponding claims of prosecutorial misconduct
as Claims 13 and 12, respectively, which the Court addressed above. (See supra.)

1 based on an incomplete trial record.” (Id.) Only part of this claim was denied without
2 a statement of reasoning. As noted, the California Supreme Court heard and rejected the
3 biblical law aspect of this claim in a reasoned opinion on direct appeal, stating that there
4 was no prejudicial prosecutorial misconduct and thus no ineffective assistance.
5 Therefore, the grounds for the state court’s rejection of the biblical law portion of the
6 claim are clearly stated, and do not persuade the Court that de novo review of that aspect
7 of the claim is appropriate.

8 With respect to the other aspect of this claim, allegations of misconduct stemming
9 from the prosecutor’s argument about weighing the penalty phase evidence, Petitioner’s
10 reference to the “incomplete trial record” belies the fact that there is a complete record
11 of the trial, appellate, and post-conviction proceedings; Petitioner appears to be instead
12 referring to the completeness, or lack thereof, of trial counsels’ files. Here, the contested
13 remarks and lack of objection by trial counsel are contained in the record, as are
14 declarations from both trial counsel, in which each attorney states that they did not recall
15 any strategic or tactical reason for failing to object to the prosecutor’s weighing
16 argument. (See Exs. 66, 67, Lodgment No. 143 at 7, 18.) Given these materials,
17 Petitioner fails to show how stated deficiencies in trial counsels’ files precluded the
18 California Supreme Court from adjudicating Claim 9 on this record.

19 In Claim 13, this Court held that even were it to assume, without deciding, that the
20 prosecutor’s weighing argument was an erroneous statement of law, Petitioner failed to
21 demonstrate that the statement “so infected the trial with unfairness as to make the
22 resulting conviction a denial of due process.” Darden, 477 U.S. at 181, quoting
23 Donnelly, 416 U.S. at 643. Particularly in light of the trial court’s detailed instructions
24 to the jurors about weighing the evidence in aggravation and mitigation, which served
25 to ameliorate any negative impact brought about by the prosecutor’s argument, the Court
26 cannot conclude that counsel’s failure to object amounted to prejudicially deficient
27 performance. The state court’s rejection of this aspect of Claim 9 was not objectively
28 unreasonable.

1 With respect to Claim 12, the California Supreme Court acknowledged that the
2 prosecutor's biblical references constituted "clear misconduct," but found that the
3 misconduct was not prejudicial. Roybal, 19 Cal. 4th at 521. Both the California
4 Supreme Court and this Court agree that the prosecutor clearly committed misconduct
5 in his repeated use of biblical scripture to support his argument that the death penalty
6 was warranted in Petitioner's case, and urging the jurors that the Bible stated that a
7 murderer "shall surely be put to death." (RT 6470.) However, this Court has found that
8 the California Supreme Court's prejudice determination was unreasonable, and that the
9 error asserted in Claim 12 had a "substantial and injurious effect or influence in
10 determining the jury's verdict." Brecht, 507 U.S. at 637.

11 It is similarly evident to this Court that defense counsel's failure to object to the
12 prosecution's improper biblical argument constituted prejudicially deficient performance
13 and that the California Supreme Court's rejection of this claim was objectively
14 unreasonable. Under Strickland, "a defendant must show both deficient performance and
15 prejudice in order to prove that he has received ineffective assistance of counsel."
16 Mirzayance, 556 U.S. at 122, citing Strickland, 466 U.S. at 687. On habeas review,
17 "[t]he pivotal question is whether the state court's application of the Strickland standard
18 was unreasonable." Richter, 562 U.S. at 101.

19 The California Supreme Court acknowledged that trial counsel failed to object to
20 the prosecutor's improper religious argument, but reasoned that the claim of ineffective
21 assistance of counsel was without merit because "there was no prejudicial prosecutorial
22 misconduct." Roybal, 19 Cal. 4th at 521 fn. 13. For the reasons discussed in greater
23 detail in the adjudication of Claim 12, the California Supreme Court was objectively
24 unreasonable in concluding that any error was harmless and did not result in prejudice
25 to Petitioner. Accordingly, because the California Supreme Court's adjudication was
26 based on an erroneous and unreasonable prejudice determination, the Court will conduct
27 a de novo review of this claim. See Richter, 562 U.S. at 101 ("The pivotal question is
28 whether the state court's application of the Strickland standard was unreasonable.")

1 To begin with, “[b]ecause many lawyers refrain from objecting during opening
2 statement and closing argument, absent egregious misstatements, the failure to object
3 during closing argument and opening statement is within the ‘wide range’ of permissible
4 professional legal conduct.” Cunningham, 704 F.3d at 1159, quoting Necoechea, 986
5 F.2d at 1281. In this instance, it is clear that the prosecutor’s closing remarks, which
6 repeatedly quoted biblical passages commanding that a murderer “shall surely” be put
7 to death, drew parallels between state law and biblical law to support his case, and
8 advocated that the Bible demanded a death sentence constituted “egregious
9 misstatements.” Trial counsel did not raise any objection to this argument and failed to
10 either request a curative instruction or address the comments in their own closing
11 argument.

12 Nor does the record support a conclusion that counsel made a tactical decision to
13 refrain from objecting during closing arguments. The record shows that defense counsel
14 made numerous objections to other portions of the prosecutor’s closing argument. (See
15 e.g. RT 6399, 6404, 6420, 6429, 6433, 6444.) These other objections only serve to
16 underscore that counsel’s failure to object to the prosecutor’s reliance on biblical
17 authority fell outside the “wide range” of reasonable conduct. Had counsel raised a
18 timely objection after the prosecutor’s initial reference, he could have at the very least
19 curtailed the remainder of the argument and requested a curative instruction neutralizing
20 the condemnable misconduct. On this record, counsels’ complete silence and utter lack
21 of action in the face of such clearly improper and inflammatory argument cannot be
22 considered reasonable or tactical.

23 Yet, in order to warrant habeas relief, a petitioner must also establish prejudice
24 from counsels’ deficient performance, by showing a “reasonable probability that, but for
25 counsel’s unprofessional errors, the result of the proceeding would have been different.”
26 Strickland, 466 U.S. at 694. “A reasonable probability is a probability sufficient to
27 undermine confidence in the outcome.” Id. “The likelihood of a different result must
28 be substantial, not just conceivable.” Richter, 562 U.S. at 112. Because of defense

1 counsels' complete failure to object to the clear misconduct in this case, the biblical
2 argument went unchallenged and unaddressed. Compare Donnelly, 416 U.S. at 645
3 (finding a lack of prejudice where the challenged comment, "admittedly an ambiguous
4 one, was but one moment in an extended trial and was followed by specific disapproving
5 instructions.") As discussed at length in Claim 12 above, the biblical comments here
6 were unambiguous, calculated for dramatic effect at the close of argument, and
7 comprised of direct biblical quotations demanding a sentence of death. Moreover, the
8 offending references were presented in juxtaposition to the guiding principles of the
9 Penal Code, as if the jury had an alternative to returning a death verdict if they could not
10 base such a result upon the law as set forth in the jury instructions. It is quite evident
11 that the prosecutor "clearly intended to appeal to religious authority" and "meant this
12 argument to have an effect on the jury." Sandoval, 241 F.3d at 780. Here, where the
13 jury clearly struggled with the penalty phase determination, deliberated for portions of
14 six court days after hearing nine days of penalty phase testimony, and on two separate
15 days expressly informed the trial judge that they were unable to reach a unanimous
16 sentencing decision, it is clear that given the severity of the misconduct, counsel's
17 concurrent failure to act was prejudicial.

18 Had counsel raised a timely objection to the prosecutor's biblical argument, the
19 trial judge could have instructed the jurors to confine their penalty phase deliberations
20 to the law as set forth in the jury instructions and completely disregard the religious
21 authority cited by the prosecutor. The failure of defense counsel to object to such
22 egregious misconduct and secure an admonition deprived defendant of the fundamental
23 fairness of a death penalty proceeding free from foul prosecutorial blows. Given the
24 misconduct and its likely impact on the jury's deliberations, the failure of defense
25 counsel "undermine[d] confidence in the outcome" of Petitioner's penalty phase
26 proceedings. Strickland, 466 U.S. at 694. Given the nature and context of defense
27 counsels' ineffectiveness, the Court is convinced that there existed a "substantial"
28 likelihood of a different result had counsel performed effectively. See Richter, 562 U.S.

1 at 112. Petitioner is entitled to habeas relief on Claim 9.

2 **7. Claim 10**

3 Petitioner contends that trial counsel rendered prejudicially deficient performance
4 in failing to obtain juror declarations in support of the defense motion for a new trial
5 because “reasonably competent counsel would have been aware that California law
6 required, in order to get a hearing on juror misconduct, sworn declarations of jurors
7 detailing the misconduct,” and argues that trial counsel’s failure to secure declarations
8 “foreclosed Mr. Roybal from examining jurors” to determine if there was bias or if the
9 jurors could be fair in considering the evidence in his case. (FAP at 277-80.)

10 Petitioner raised this contention as part of Claim 1 in the state habeas petition.
11 (Lodgment No. 133.) The California Supreme Court rejected the claim on the merits
12 without a statement of reasoning. (Lodgment No. 144.)

13 Similar to his contention in Claim 9, Petitioner contends that because this claim
14 was denied without an adequate record, de novo review is necessary. (FAP at 280-81.)
15 He asserts that if the California Supreme Court found no showing of deficient
16 performance, such a conclusion would have constituted an unreasonable application of
17 Strickland. (FAP at 281.) Petitioner argues that the “only possible basis for a denial of
18 relief on this claim was that Mr. Roybal failed to demonstrate prejudice, but such a
19 determination would have been based on an incomplete trial record without a hearing to
20 determine if there was actual or implied bias against him.” (Id.) Yet, as with Claim 9,
21 Petitioner’s reference to the “incomplete trial record” does not address the fact that there
22 *is* a complete record of the trial, appellate, and post-conviction proceedings; again,
23 Petitioner appears to be instead referring to the completeness, or lack thereof, of trial
24 counsels’ files. The record contains a transcript of the post-trial hearing and counsels’
25 arguments regarding the juror misconduct, the motion for a new trial and counsels’
26 declarations, and the post-conviction declaration of Juror Nelson. Both trial attorneys
27 have submitted declarations from both trial counsel stating that neither recall any
28 strategic or tactical reason for failing to obtain juror declarations in support of the motion

1 for a new trial rather than supporting the motion with the declaration of counsel. (See
2 Exs. 66, 67, Lodgment No. 143 at 7-8, 18-19.) Petitioner fails to show how any
3 deficiencies in the completeness of trial counsels' files compromise the adequacy of the
4 record with respect to this claim.

5 After Petitioner's conviction and penalty phase verdict, the defense moved for a
6 new trial on several grounds, including juror misconduct. (See RT 6705-15.) The
7 defense alleged that during deliberations, several jurors discussed their own experiences
8 with abuse in their families, even though only one juror indicated such a history in the
9 completed juror questionnaires. (CT 2241-46, 2256-57.) The defense's investigator
10 contacted the jurors after the trial, obtained substantive responses from Jurors Thomas
11 and Nelson, and counsel indicated that: "Mr. Kennedy [the defense investigator]
12 attempted to have further interviews with some of the jurors. I am informed and believe
13 that some of the jurors were hesitant to speak further with Mr. Kennedy." (CT 2256-57.)
14 The prosecution objected to defense counsel's declaration and moved to strike it as
15 hearsay. (RT 6705, 6707-10.) Defense counsel explained that the investigator was on
16 vacation when the motion was filed, but had interviewed the jurors and was present in
17 the courtroom, and stated that: "The jurors were not very open to Mr. Kennedy upon his
18 second effort to contact them, and I'm not sure why that was, but we were unable to
19 obtain affidavits from the jury on our efforts to get back to the jury." (RT 6706.)
20 Specifically, defense counsel noted that the investigator spoke again to Juror Thomas,
21 and: "Mr. Thomas was unable to give us any further information to us at that time, and
22 the impression was left that he did not want to talk to Mr. Kennedy any further about
23 this." (RT 6708.) The trial court granted the prosecution's motion to strike the
24 declaration as hearsay and concluded that any similar statement by the defense
25 investigator would also constitute hearsay. (RT 6714-16.)

26 Petitioner points out that he was able to obtain a juror declaration during post-
27 conviction proceedings, and argues that trial counsel was ineffective for failing to obtain
28 post-trial declarations from the jury members. Juror Nelson states that "I spoke to an

1 investigator for the defense after the verdict in 1992, and I relayed this information to
2 him, but no one asked me to provide a declaration on this topic until now.” (Ex. 31,
3 Lodgment No. 138 at 1166-67.) Trial counsel both state:

4 Unlike the affidavit I filed in support of the motion for new trial, the
5 declaration of juror Nelson filed with the habeas petition was not hearsay
6 but described what the juror saw and heard from other jurors as to the
7 conduct of those jurors. I recall no strategic reason for me not to follow the
8 existing case law requiring a declaration from the juror directly and not
9 what was told to my investigator.

10 (Exs. 66, 67, Lodgment No. 143 at 7-8, 18-19.)

11 In any event, regardless of counsels’ asserted failure to obtain post-trial
12 declarations from the jurors, this claim is without merit because Petitioner fails to
13 demonstrate prejudice. As discussed in greater detail in Claim 25, even to the extent the
14 Court can consider the content of the submitted juror declaration, Petitioner has not
15 shown that the jurors were intentionally dishonest in their questionnaire or voir dire
16 responses, or that they were biased against Petitioner. (See Claim 25, supra.) The
17 questionnaires covered a range of topics and a number of jurors indicated experience
18 with matters similar to child abuse and domestic violence, such as alcoholism in their
19 families, child abuse, or domestic violence counseling, and violence as a result of
20 alcoholism, as well as the vague wording and lack of definition of the term “close to
21 you,” and the Court cannot conclude that the jurors’ answers to the cited questions were
22 either deliberately dishonest or indicative of bias. See Dyer, 151 F.3d at 973 (“[A]n
23 honest yet mistaken answer to a voir dire question rarely amounts to a constitutional
24 violation; even an intentionally dishonest answer is not fatal, so long as the falsehood
25 does not bespeak a lack of impartiality.”), citing McDonough, 464 U.S. at 555-56. Based
26 on this review of the record, Petitioner has not demonstrated a “reasonable probability
27 that, but for counsels’ allegedly unprofessional errors in failing to obtain juror
28 declarations, the result of the proceedings would have been different.” Strickland, 466
U.S. at 694. Petitioner does not merit habeas relief or an evidentiary hearing on Claim
10. See Totten, 137 F.3d at 1176 (“[A]n evidentiary hearing is *not* required on issues

1 that can be resolved by reference to the state court record.”). Petitioner is not entitled
2 to habeas relief on Claim 10.

3 **8. Claim 28**

4 Petitioner asserts that his “direct appeal did not allege either prosecutorial
5 misconduct as a result of the prosecutor’s erroneous argument that discounted the effect
6 of any one factor in mitigation as a reason not to impose a sentence of death, and the
7 related error arising from the trial court’s sua sponte instructions that minimized the
8 evidence in mitigation of Mr. Roybal’s character and background that was offered under
9 California Penal Code § 190.3, subdivision (k),” and that appellate counsel’s failure to
10 raise these meritorious issues, Claims 13 and 24 in the FAP, constituted ineffective
11 assistance. (FAP at 380.)

12 Petitioner raised this contention as part of Claim 10 in the state habeas petition.
13 (Lodgment No. 133.) The California Supreme Court rejected the claim on the merits
14 without a statement of reasoning. (Lodgment No. 144.)

15 “[A] criminal defendant has a right to effective assistance of counsel on a first
16 appeal as of right.” Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 284 (1998),
17 citing Evitts v. Lucey, 469 U.S. 387, 394-96 (1985). However, “appellate counsel has
18 no constitutional obligation to raise every non-frivolous issue requested by the
19 defendant.” Miller v. Keeney, 882 F.2d 1428, 1434 n.10 (9th Cir. 1989), citing Jones v.
20 Barnes, 463 U.S. 645, 751-54 (1983). “In many instances, appellate counsel will fail to
21 raise an issue because she foresees little or no likelihood of success on that issue; indeed,
22 the weeding out of weaker issues is widely recognized as one of the hallmarks of
23 effective appellate advocacy.” Miller, 882 F.2d at 1434. To merit relief, a petitioner
24 must satisfy Strickland by showing both that counsel’s performance was deficient, and
25 “that there is a reasonable probability that, but for counsel’s unprofessional errors,
26 [petitioner] would have prevailed on appeal.” Id. at 1433-34, citing Strickland, 466 U.S.
27 at 688, 694.

28 While not raised on direct appeal, Claims 13 and 24 were each raised in the state

1 habeas petition, and the California Supreme Court found that Petitioner was not entitled
2 to habeas relief on either claim. Petitioner also raised these two claims in the instant
3 Petition, and this Court has similarly found the claims lacking in merit. With respect to
4 Claim 13, in which Petitioner asserts that the prosecutor committed misconduct by
5 making an erroneous statement about California sentencing law in closing arguments,
6 the Court concluded that even assuming the argument constituted misconduct, given the
7 trial court's instructions to the jury outlining the correct legal standard and
8 admonishments that the statements of counsel were not evidence, the statement did not
9 render the proceedings unfair. (See Claim 13, supra.) With respect to Claim 24, the
10 Court rejected Petitioner's contention that the trial court erred in giving the jury a sua
11 sponte instruction in response to their deadlock that improperly minimized the evidence
12 presented in mitigation, reasoning that a simple mention of expert testimony did not
13 minimize the jury's consideration of the other mitigation evidence, as the trial court
14 clearly stated that there was "a lot" of evidence in mitigation and directed the jurors as
15 to factor (k), which allowed them to consider in mitigation "anything about the
16 defendant, his background, his upbringing, any sympathetic factor and so forth." (See
17 Claim 24, supra, quoting RT 6657.)

18 Thus, even had appellate counsel raised Claims 13 and 24, the Court finds no
19 "reasonable probability" of a different result on appeal. Strickland, 466 U.S. at 694; see
20 also Miller, 882 F.2d at 1434 n. 9 (in evaluating a claim of ineffective assistance of
21 appellate counsel, "the appeal is the relevant proceeding to consider."), citing United
22 States v. Birtle, 792 F.2d 846, 849 (9th Cir. 1986) and Strickland, 466 U.S. at 694. "The
23 failure to raise a meritless legal argument does not constitute ineffective assistance of
24 counsel." Baumann v. United States, 692 F.2d 565, 572 (9th Cir. 1982).

25 The California Supreme Court's rejection of this claim was neither contrary to, nor
26 an unreasonable application of, clearly established federal law and was not based on an
27 unreasonable determination of the facts. Petitioner is not entitled to habeas relief on
28 Claim 28.

D. CLAIMS CONCERNING POST-CONVICTION PROCEEDINGS

1. Claims 26 and 27

In Claim 26, Petitioner contends that “[t]he destruction of the trial files denied Mr. Roybal his Due Process Right under the Fourteenth Amendment to the effective assistance of habeas counsel given that California has created the right to appointed counsel in habeas corpus proceedings” and “rendered effective judicial review of any habeas corpus claim in state court impossible, a further Due Process violation making it impossible for Mr. Roybal to pursue habeas relief in state court.” (FAP at 356.) In Claim 27, Petitioner argues that “[t]he destruction of the trial files not only made it impossible for successor counsel to determine what issues could be raised and substantiated, but also irreparably compromised the ability of a reviewing court to conduct a meaningful review of the claims raised on habeas corpus,” depriving him of his constitutional rights. (FAP at 376.)

Petitioner raised these claims as Claim 11 of the state habeas petition. (Lodgment No. 133.) The California Supreme Court rejected that claim on the merits without a statement of reasoning. (Lodgment No. 144.)

Specifically, Petitioner asserts that the actions of prior habeas counsel, who was responsible for the destruction of trial counsels’ files, combined with the lack of supervision and monitoring by the California Supreme Court and state agencies responsible for monitoring capital cases, have rendered current habeas counsel ineffective and violated his right to due process. (FAP at 355-63, 367-71.) Petitioner asserts that despite the substantial efforts of counsel, the complete files could not be recovered or reconstructed. (*Id.* at 363-67.) Petitioner states that: “The destruction of the trial files vitiated Mr. Roybal’s right under California law to habeas corpus attacking a capital conviction because the destruction of the trial files rendered it impossible to determine what trial counsel knew or could have known because trial counsel’s records have been destroyed.” (*Id.* at 377.) Petitioner nevertheless argues that “it is possible to identify some areas where the lack of trial files directly compromises Mr. Roybal’s

1 ability to present an effective habeas corpus petition on the issue of ineffective assistance
 2 of counsel.” (Id.) He has identified five areas in which he alleges that his ability to
 3 present an effective habeas corpus petition has been compromised:

- 4 1. Information trial counsel had concerning any brain damage he may
 5 have suffered prior to June 1989.
- 6 2. Information from family members or other individuals, who were
 7 alive in 1992 but are now deceased, that could have been obtained
 8 and presented at trial.
- 9 3. Ability to preserve/present information re: juror misconduct- i.e.,
 10 Juror Hat, who indicated misconduct, is now deceased.
- 11 4. Destruction or inability to locate jail records showing Petitioner’s
 12 “positive institutional adjustment.”
- 13 5. Destruction “also makes it impossible to determine if the prosecution
 14 had produced all discovery” under state law and Brady/Kyles.

15 (Id. at 377-78.)

16 Petitioner argues that both a current practicing habeas practitioner and former
 17 habeas counsel Babcock “stated the need for habeas corpus counsel to review the trial
 18 files in order to assess any prejudice from trial counsel actions or omissions, and that
 19 counsel could not present an effective habeas corpus petition with the state of the trial
 20 files in this case.” (Traverse at 45-46.) At a 2007 state superior court hearing on
 21 Petitioner’s post-conviction discovery motion, Babcock was asked about the files he
 22 recovered from Barranco in 2004: “As former habeas counsel, do you think you could
 23 have prepared the habeas corpus petition with the boxes in condition they were in?” to
 24 which he replied “It would be impossible.” (Ex. 59, Lodgment No. 139 at 1536-37.)
 25 Meanwhile, in 2008, attorney Verna Wefald, an appellate and habeas practitioner in
 26 California state and federal court, reviewed nine boxes of recovered trial files kept in
 27 storage, and stated:

28 In my opinion, these boxes and their contents are completely useless in
 assisting Mr. Roybal’s current counsel in raising habeas claims. The boxes
 and their contents would not assist in refreshing anyone’s recollection. The
 boxes and their contents cannot be used to prove what investigation was
 done by trial counsel and/or what evidence was disclosed by the
 prosecution at the time of trial. Because of the poor condition of the trial

1 files, in my opinion Mr. Roybal will be deprived of his right to investigate,
2 to plead and to prove IAC or Brady claims.

3 (Ex. 61, Lodgment No. 142 at 33.)

4 Both Claims 26 and 27 are centered on Petitioner's contention that the destruction
5 of trial counsels' files has prevented the effective presentation and review of his habeas
6 corpus petition and frustrated the exercise of his right to habeas corpus review. Because
7 these claims are premised on events that took place during post-conviction proceedings,
8 namely, the destruction of trial counsels' files by prior habeas counsel, Petitioner fails
9 to show that federal habeas is an appropriate forum. See Murray v. Giarratano, 492 U.S.
10 1, 10 (1989) ("State collateral proceedings are not constitutionally required as an adjunct
11 to the state criminal proceedings and serve a different and more limited purpose than
12 either the trial or appeal.") The Ninth Circuit has held that "a petition alleging errors in
13 the state post-conviction review process is not addressable through habeas corpus
14 proceedings." Franzen v. Brinkman, 877 F.2d 26, 26 (9th Cir. 1989); see also
15 Villafuerte, 111 F.3d at 632 n.7 (petitioner's claim that "he was denied due process in
16 his state habeas corpus proceedings" was "not addressable in a section 2254
17 proceeding."), citing Franzen, 877 F.2d at 26; see also Cooper v. Neven, 641 F.3d 322,
18 331-32 (9th Cir. 2011) (dismissing petitioner's alleged violations of due process
19 "stemming from the state trial court's failure to conduct an in camera inspection of the
20 prosecutor's trial file during the post-conviction evidentiary hearing" and "arising from
21 the State's destruction or loss of the prosecutor's trial notes," stating that the claims "are
22 not cognizable for federal habeas review."), citing Franzen, 877 F.2d at 26.

23 In any event, to the extent the Court can even address Petitioner's contention that
24 he was denied the exercise of federal habeas review, given that the asserted error took
25 place during post-conviction proceedings and were the result of actions by prior counsel
26 rather than the State, the United States Supreme Court has generally affirmed that
27 "prisoners have a constitutional right of access to the courts." Bounds v. Smith, 430 U.S.
28 817, 821 (1977). "[Supreme Court] decisions have consistently required States to

1 shoulder affirmative obligations to assure all prisoners meaningful access to the courts.”
2 Id. at 824. To demonstrate a claim for relief, a petitioner must show “actual injury,” for
3 instance, that a “nonfrivolous legal claim had been frustrated or was being impeded.”
4 Lewis v. Casey, 518 U.S. 343, 351-53 (1996).

5 Petitioner speculates that with complete trial counsels’ files, he may have been
6 able to raise additional claims of ineffective assistance of counsel or Brady violations,
7 but Petitioner fails to demonstrate that he was prevented from raising any specific claim
8 due to the destruction of the files. In 2004, Babcock stated that the effective preparation
9 of a habeas petition would have been “impossible,” and attorney Wefald states that the
10 condition of the files she viewed in 2008 would prevent Petitioner from investigating,
11 pleading, or proving Brady claims or claims of ineffective assistance of counsel, but
12 Petitioner fails to show that he was actually prevented from raising or proving such
13 claims. Indeed, the state habeas petition contained several claims alleging ineffective
14 assistance of counsel, supported by numerous volumes of exhibits. The FAP,
15 meanwhile, contains those same claims of ineffective assistance of counsel asserting
16 deficiencies in pre-trial preparation, as well as the guilt phase, penalty phase, and post-
17 trial actions of counsel, in addition to the alleged failures of appellate counsel.

18 Petitioner asserts that the loss of the files compromises his ability to present an
19 effective petition with respect to evidence that could have been presented at trial, such
20 as evidence in trial counsels’ possession of brain damage, family member evidence from
21 individuals alive in 1992 who are now deceased, juror information, and jail records.
22 Again, Petitioner only speculates that such information may have been contained in
23 counsels’ files and was destroyed. Moreover, Petitioner presented several claims in both
24 the state and federal habeas petitions, supported by declarations and other
25 documentation. In Claims 5 and 6 of the instant Petition, Petitioner contends that trial
26 counsel was ineffective for failing to present evidence of Petitioner’s brain damage
27 during the guilt and penalty phases, and has attached numerous expert declarations and
28 copies of evaluations performed both in preparation for trial and during post-conviction

1 proceedings. (See Exs. 8-12, Lodgment No. 134; Exs. 60, 65, Lodgment No. 142.) In
2 Claim 7, Petitioner asserts that counsel failed to properly investigate and present his
3 social history, and has attached numerous declarations from family members and a social
4 history prepared by a psychologist. (See Exs. 1-5, 13, Lodgment No. 134.) In Claim 8,
5 Petitioner asserts that trial counsel failed to present evidence of Petitioner's positive
6 institutional adjustment, and has attached numerous correctional records as well as an
7 expert declaration from a professor specializing in psychology and law. (See Exs. 21-23,
8 27-29, 30, Lodgment Nos. 135, 137, 138.) Finally, in Claims 10 and 25, Petitioner raises
9 claims regarding juror misconduct and ineffective assistance of counsel, and has attached
10 one juror declaration, as well as a declaration from an investigator who located and
11 interviewed ten of Petitioner's trial jurors, as well as one alternate juror. (See Lodgment
12 No. 138 at 1166-69, Exs. 31, 32.) The claims of ineffective assistance of counsel are
13 also supported by the declarations of both trial counsel regarding their recollections and
14 review of available documentation. (See Exs. 66, 67, Lodgment No. 143.) Given that
15 the state habeas petition contained a total of twenty claims, and was supported by over
16 60 exhibits totaling over 1500 pages, Petitioner fails to specify how the destruction of
17 trial counsels' files resulted in "actual injury," such as preventing him from raising valid
18 claims for relief.

19 Petitioner also fails to offer any indication that the destruction of the trial files
20 prevented the presentation of a Brady claim. The only claim in the FAP that implicates
21 Brady is Claim 1, which was raised on direct appeal. As such, there is no indication that
22 the destruction of trial counsels' files had any impact on current counsels' ability to
23 plead or prove this claim. Petitioner fails to show the existence of any other Brady claim
24 that he was unable to present because of the loss of files. During post-conviction
25 proceedings, the record reflects that the trial prosecutor assisted habeas counsel in their
26 attempts to reconstruct the record by providing copies of the trial discovery, which
27 included both discovery provided to the defense by the prosecution, as well as discovery
28 the prosecution was provided by the defense. (See Exs. 59, Lodgment No. 139 at 1558.)

1 After continued litigation on the post-conviction discovery issues, including extended
 2 discussion regarding the continued inability to locate the lost doorjamb evidence, the
 3 state superior court ruled that the prosecutor had complied with the discovery order.
 4 (See Ex. 64, Lodgment No. 142 at 121.)

5 In sum, while Petitioner speculates that with intact trial counsels' files, he *may*
 6 have been able to raise additional claims of ineffective assistance of counsel or Brady
 7 violations, he has not demonstrated "actual injury" with respect to his ability to present
 8 a habeas corpus petition in state or federal court, nor has he pointed to any specific claim
 9 that he was unable to present. Casey, 518 U.S. at 351-53. Thus, even to the extent this
 10 contention may be cognizable on federal review, Petitioner fails to demonstrate a
 11 constitutional violation based on his prior habeas counsels' destruction or loss of trial
 12 counsels' files.³⁹ As such, these claims fail even under a de novo review.

13 Accordingly, for the reasons discussed above, with respect to the entirety of
 14 Claims 26 and 27, the Court cannot conclude that the California Supreme Court's
 15 rejection of these claims was either contrary to, or an unreasonable application of, clearly
 16 established federal law or was based on an unreasonable determination of the facts.
 17 Petitioner is not entitled to habeas relief on these claims. Accordingly, the Court denies
 18 Petitioner's request for an evidentiary hearing or discovery on these claims. See Sully
 19 v. Ayers, 725 F.3d 1057, 1075 (9th Cir. 2013) ("[A]n evidentiary hearing is pointless
 20

21 ³⁹ Petitioner's assertion in Claim 26 that the destruction of trial counsels' files
 22 denied him the effective assistance of counsel in his habeas proceedings also fails to find
 23 support in clearly established federal law. "There is no constitutional right to an attorney
 24 in state post-conviction proceedings." Coleman v. Thompson, 501 U.S. 722, 752 (1991),
 25 citing Pennsylvania v. Finley, 481 U.S. 551 (1987) and Murray v. Giarratano, 492 U.S.
 26 1 (1989). "Consequently, a petitioner cannot claim constitutionally ineffective assistance
 27 of counsel in such proceedings." Coleman, 501 U.S. at 752, citing Wainwright v. Torna,
 28 455 U.S. 586 (1982) (per curiam); see also Bonin v. Calderon, 77 F.3d 1155, 1159 (9th
 Cir. 1996) ("We and the Supreme Court repeatedly have held that there is no
 constitutional right to effective assistance of counsel in habeas corpus cases."), citing
Coleman, 501 U.S. at 755, Finley, 481 U.S. at 551, 555, Bonin v. Vasquez, 999 F.2d 425,
 429 (9th Cir. 1993), Harris v. Vasquez, 949 F.2d 1497, 1513-14 (9th Cir. 1990). Section
 2254 clearly states that: "[t]he ineffectiveness or incompetence of counsel during Federal
 or State collateral post-conviction proceedings shall not be a ground for relief in a
 proceeding arising under section 2254." 28 U.S.C. § 2254(i).

1 once the district court has determined that § 2254(d) precludes habeas relief.”); Kemp
 2 v. Ryan, 638 F.3d 1245, 1260 (9th Cir. 2011) (“Because Kemp is not entitled to an
 3 evidentiary hearing, the district court did not err in denying his request for discovery, as
 4 well as his request for a hearing.”)

5 **2. Claim 29**

6 Petitioner asserts that he was deprived of the effective assistance of counsel and
 7 equal protection under the Sixth and Fourteenth Amendments to the Constitution
 8 “because private attorneys are appointed to prepare his petition for a writ of habeas
 9 corpus. Similarly situated condemned prisoners who are represented by the Habeas
 10 Corpus Resource Center or the Office of the State Public Defender have more resources
 11 devoted to their cases.” (FAP at 380-81.) Petitioner also challenges numerous aspects
 12 of the State of California’s post-conviction procedures, including the compensation
 13 system, filing deadlines, and the fact that the petition is heard only by the California
 14 Supreme Court, asserting that the California Supreme Court “is more vulnerable to
 15 political pressure than appellate courts.” (Id. at 380-83.) He also asserts equal
 16 protection violations based on filing deadlines in capital cases that do not exist in non-
 17 capital cases and differences in the appellate review system for capital and non-capital
 18 petitioners. (Id. at 382-83.)

19 Petitioner raised this claim as Claim 13 of the state habeas petition. (Lodgment
 20 No. 133.) The California Supreme Court rejected this claim on the merits without a
 21 statement of reasoning. (Lodgment No. 144.)

22 As an initial matter, with respect to Petitioner’s equal protection claims stemming
 23 from the different procedures for petitions from capital and non-capital prisoners, the
 24 Court addresses this constitutional issue in greater detail in the adjudication of
 25 Petitioner’s equal protection claim. (See Claim 35, infra.) Briefly, as capital and non-
 26 capital prisoners are not “similarly situated” to one another, different rules regarding the
 27 adjudication of their petitions do not appear amenable to an equal protection analysis.
 28 See Massie v. Hennessey, 875 F.2d 1386, 1389 (9th Cir. 1989) (“The relevant

1 comparison for equal protection purposes is between two defendants, both of whom are
2 sentenced to death.”) Petitioner fails to cite to any clearly established law supporting his
3 contention that the State of California’s capital case filing deadlines or the California
4 Supreme Court’s jurisdiction over capital petitions offends federal constitutional
5 principles. Moreover, Petitioner fails to offer any indication that the existence of filing
6 deadlines or the California Supreme Court’s jurisdiction prejudiced his ability to prepare
7 and file a state habeas petition, complete his state habeas proceedings, or violated his
8 federal constitutional rights.

9 Petitioner also asserts that he “and all other condemned prisoners are prejudiced
10 because their post conviction procedures only go to one court, the California Supreme
11 Court, which is more vulnerable to political pressure than appellate courts, since three
12 members of the Bird court were voted off the court because of death penalty decisions,”
13 and contends that appointments to the California Supreme Court “are more political”
14 than those to the lower state appellate courts. (FAP at 382.) However, Petitioner fails
15 to offer any factual support for this generalized and conclusory assertion of prejudice.
16 See Withrow v. Larkin, 421 U.S. 35, 47 (1975) (a claim of judicial bias “must overcome
17 a presumption of honesty and integrity in those serving as adjudicators.”) Petitioner fails
18 to cite to any evidence in the record demonstrating that the California Supreme Court
19 justices who adjudicated his direct appeal or state habeas petition were influenced by
20 political pressure which impacted their decisions in this case.

21 Next, Petitioner contends that his due process rights were violated “by an inherent
22 conflict that exists for all cases in which private counsel are appointed because the same
23 court that rules on the petition also controls and limits the resources of the attorney who
24 prepares the petition.” (FAP at 383.) Again, Petitioner fails to offer facts showing that
25 his direct appeal or state habeas petition were impacted by any such conflict.

26 Finally, Petitioner contends that several aspects of California Supreme Court
27 policies violate constitutional guarantees, particularly the limitations on fees for the
28 investigation and preparation of the state habeas petition by appointed counsel, as

1 counsel was required to either “agree to a fix fee payment for his or her services at the
2 outset of their appointment” or to be compensated on an hourly basis; “[h]owever, the
3 limit placed on hours for which both counsel will be compensated for preparation of the
4 petition is about 500 hours total, an amount of time completely inadequate for the
5 preparation of a petition in a case of this complexity and history.” (Id. at 381.)
6 Petitioner argues that “the use of flat fees, caps on compensation and lump sum contract
7 is improper under the 2003 ABA Guidelines for the Appointment and Performance of
8 Defense Counsel in Death Penalty Cases 9.1.B.1.” (Id.) Here too, Petitioner fails to
9 offer any evidence that the California Supreme Court’s policies or fee agreement
10 prejudiced his ability to prepare and file a state habeas petition, complete his state habeas
11 proceedings, or violated his federal constitutional rights. Petitioner contends that the
12 ABA Guidelines “have been repeatedly used by the United States Supreme Court in
13 determining the reasonableness of counsel’s performance under the Sixth and Fourteenth
14 Amendments to the United States Constitution in capital cases. (*Rompilla v. Beard*,
15 *supra*, 545 U.S. at p. 387; *Wiggins v. Smith*, *supra*, 539 U.S. at p. 522.)” (FAP at 382.)
16 While these guidelines have been used as tools to evaluate claims of ineffective
17 assistance of counsel, Petitioner fails to offer any clearly established authority supporting
18 their application in this context. In any event, the United States Supreme Court has made
19 it clear that the guidelines are useful “as evidence of what reasonably diligent attorneys
20 would do,” as opposed to outlining requirements for the performance of counsel. See
21 Van Hook, 558 U.S. at 8 (“Strickland stressed, however, that ‘American Bar Association
22 standards and the like’ are ‘only guides’ to what reasonableness means, not its
23 definition.”), quoting Strickland, 466 U.S. at 688. As such, Petitioner fails to
24 demonstrate that the ABA Guidelines’ general disapproval of a capital case fee structure
25 such as California’s is sufficient to state a claim of constitutional error.

26 Petitioner also fails to offer any facts demonstrating that the sums provided for his
27 state post-conviction representation were insufficient for the necessary investigation in
28 this case. See James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994) (“Conclusory allegations

1 which are not supported by a statement of specific facts do not warrant habeas relief.”)
 2 The habeas petition filed before the California Supreme Court in this case was over two
 3 hundred pages in length, contained twenty enumerated claims, and was accompanied by
 4 six volumes of exhibits.

5 In sum, given the absence of any controlling authority supporting his contention,
 6 the Court cannot conclude that the California Supreme Court’s rejection was either
 7 contrary to, or an unreasonable application of, clearly established federal law, nor has
 8 Petitioner shown that it was based on an unreasonable determination of the facts.
 9 Petitioner also requests discovery and an evidentiary hearing on this claim in order to
 10 present evidence about the disparity in resources between state agencies and private
 11 counsel. (See *Traverse* at 117; see also *Pet. EH Mem.* at 8-9.) Because Petitioner fails
 12 to demonstrate that the facts alleged, if proven, would entitle him to habeas relief,
 13 evidentiary development is not warranted on this claim. See *Williams*, 384 F.3d at 586.

14 **E. STATUTORY CLAIMS**

15 **1. Claim 30**

16 Petitioner asserts that his conviction and sentence were imposed in violation of his
 17 state and federal constitutional rights, state statutory rights, and international law,
 18 “because the death penalty is imposed arbitrarily and capriciously depending on the
 19 county in which the case is prosecuted.” (*FAP* at 383.)

20 Petitioner relies on *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), in asserting
 21 that “the United States Supreme Court established that fundamental rights cannot be
 22 denied based upon arbitrary and disparate statewide ‘standards.’” (*FAP* at 384.) He
 23 argues that “the Court held that where a single state entity has the power to assure
 24 uniformity in implementing a fundamental right, there must be assurance that the
 25 rudimentary requirements of equal treatment and fundamental fairness are satisfied,” and
 26 that “[p]ursuant to *Gore*, implementation of the death penalty in California violates the
 27 Equal Protection Clause because the decision whether to seek the death penalty against
 28

1 a potentially death eligible defendant (i.e., one against whom a murder with special
2 circumstances has been charged) is left solely to the discretion of the prosecutor in the
3 county where the crime was committed.” (Id.) However, in Bush v. Gore, a case
4 concerning legal challenges arising from the 2000 presidential election, the Supreme
5 Court specifically stated that “*our consideration is limited to the present circumstances,*
6 *for the problem of equal protection in election processes generally presents many*
7 *complexities.*” Id., 531 U.S. at 109 (emphasis added). Petitioner fails to offer any legal
8 authority in support of his assertion that the case is applicable in this context. Given the
9 expressly limited nature of the Supreme Court’s holding, the Court remains unpersuaded
10 that Bush v. Gore is relevant to the issue at hand.

11 The Supreme Court has also repeatedly rejected the argument that prosecutorial
12 discretion in capital charging violates constitutional principles. See e.g. Jurek v. Texas,
13 428 U.S. 262, 274 (1976); Proffitt v. Florida, 428 U.S. 242, 254 (1976); Gregg v.
14 Georgia, 428 U.S. 153, 199-200 (1976). The California Supreme Court, applying these
15 holdings, has similarly rejected this contention. See e.g. People v. Williams, 16 Cal. 4th
16 153, 278 (Cal. 1997), quoting People v. Keenan, 46 Cal. 3d 478, 505 (Cal. 1988)
17 (“[P]rosecutorial discretion to select those eligible cases in which the death penalty will
18 actually be sought does not in and of itself evidence an arbitrary and capricious capital
19 punishment system or offend principles of equal protection, due process, or cruel and/or
20 unusual punishment.”), citing Jurek, 428 U.S. at 274, Proffitt, 428 U.S. at 254, Gregg,
21 428 U.S. at 199-200.

22 Petitioner fails to demonstrate that the California Supreme Court’s rejection of this
23 claim was contrary to, or an unreasonable application of, clearly established federal law.
24 Petitioner requests discovery and an evidentiary hearing on this claim in order to
25 “present evidence of the disparity in charging of the death penalty in various counties in
26 California.” (Traverse at 132; see also Pet. EH Mem. at 8-9.) Because Petitioner fails
27 to demonstrate that the facts alleged, if proven, would entitle him to relief, evidentiary
28 development is not warranted. See Williams, 384 F.3d at 586.

1 **2. Claim 31**

2 Petitioner contends that his conviction and death sentence violate the California
3 and United States Constitutions “because California’s method of execution constitutes
4 cruel and unusual punishment and was adopted by means which violate fundamental
5 principles of procedural and substantive due process.” (FAP at 386.)

6 Petitioner raised this claim as Claim 19 of the state habeas petition. (Lodgment
7 No. 133.) The California Supreme Court denied the claim, stating: “Claim 19 is denied
8 as premature without prejudice to petitioner’s filing a renewed petition after any
9 execution date is set. (*People v. Lawley* (2002) 27 Cal.4th 102, 169, fn. 25.)”
10 (Lodgment No. 144.)

11 Respondent maintains that the claim is unripe for review. (Ans. at 123, citing
12 Payton v. Cullen, 658 F.3d 890, 893 (9th Cir. 2011).) In the Traverse, Petitioner
13 acknowledged that the California Supreme Court denied this claim as premature and
14 concedes that the California Department of Corrections and Rehabilitation [“CDCR”]
15 has not yet put forth new proposed regulations, yet requests that:

16 In an abundance of caution and to unquestionably preserve this issue for
17 review, Mr. Roybal asks this Court to not only not dismiss this claim as
18 premature, but to grant discovery and an evidentiary hearing on the
19 constitutional [sic] of lethal injection as a means of carrying out the penalty
of death in California if and when the CDCR puts forth its proposed
protocol.

20 (Traverse at 115.) Petitioner did not include this claim in his Memorandum in Support
21 of Request for an Evidentiary Hearing or Discovery. (See ECF No. 249.)

22 The California Court of Appeal has held that the most recent revised protocol is
23 invalid and has “permanently enjoin[ed] the CDCR from carrying out the execution of
24 any condemned inmate by lethal injection unless and until new regulations governing
25 lethal injection execution are promulgated in compliance with the APA [Administrative
26 Procedure Act].” Sims v. Cal. Dep’t of Corrections & Rehabilitation, 216 Cal. App. 4th
27 1059, 1083-84 (Cal. App. Ct. 2013).

28 As the parties appear to agree that California lacks a lethal injection protocol at

1 present, the claim does not appear to be ripe for review. See Payton, 658 F.3d at 893
2 (“No new protocol was in place when the district court ruled” on a lethal injection
3 challenge and “the claim was unripe, and it should have been dismissed.”) Other courts
4 in this district have previously denied habeas challenges to California’s lethal injection
5 procedures without prejudice as premature. See Michaels v. Chappell, No. 04cv0122
6 JAH (JLB) 2014 WL 7047544, at *118-19 (S.D. Cal. December 18, 2014); Ayala v.
7 Chappell, No. 01cv0741 BTM (MDD), 2013 WL 1315127, at *41 (S.D. Cal. March 28,
8 2013); Carter v. Chappell, 06cv1343 BEN (KSC) 2013 WL 1120657, at * 196-97 (S.D.
9 Cal. March 18, 2013). This Court is in accord with those decisions. Claim 31 is denied
10 without prejudice as premature. Neither discovery nor an evidentiary hearing is
11 warranted on this claim.

12 **3. Claim 32**

13 Petitioner asserts that his conviction and sentence were imposed in violation of his
14 rights under the federal and state constitutions and international law, “because his
15 convictions and sentence were based on inaccurate, unreliable evidence, ambiguous
16 instructions, misleading argument and are disproportionate to Mr. Roybal’s culpability.”
17 (FAP at 397.) He argues that due to the ineffectiveness of trial counsel, the jury was not
18 accurately apprised of his mental impairments, the extent of the neglect and abuse he
19 suffered, his head injuries, and his family’s mental health history or history of alcohol
20 and drug abuse. (Id. at 400.) Petitioner contends that “had trial counsel conducted a
21 reasonably competent investigation and prepared and presented the plethora of available
22 information concerning his harrowing upbringing and psychological and neurological
23 impairments, and had there been meaningful intercase proportionality review, the gross
24 disproportion of his sentence would be readily apparent.” (Id.)

25 Petitioner raised this claim on state habeas review and the California Supreme
26 Court rejected it on the merits without a statement of reasoning. (See Lodgment Nos.
27 133, 144.) Respondent maintains that “[t]hese contentions are simply a generalized
28 summary of ineffective assistance of counsel arguments made by Roybal in Claims Five,

1 Six, and Seven of the FAP,” and that the California Supreme Court reasonably rejected
2 this claim on habeas review. (Ans. at 124.)

3 Based on a review of the pleadings and record, it appears that Petitioner has
4 combined and restated his claims of ineffective assistance of counsel to assert that
5 because of counsels’ failings, the jury was not provided with accurate information upon
6 which to based their sentencing determination, and that “[t]he person whom the jury
7 believed it was sentencing to death bore little resemblance to Mr. Roybal.” (FAP at 400;
8 see also Traverse at 119.) Petitioner claims that counsels’ failings deprived him of his
9 right to a reliable and individualized sentencing determination. (FAP at 399.)

10 The Supreme Court instructs that “an individualized decision is essential in capital
11 cases.” Lockett, 438 U.S. at 605. The jury was presented with an extensive mitigation
12 presentation, including expert testimony about Petitioner’s organic brain damage, mental
13 health issues, and history of substance abuse. The jury was also presented with detailed
14 testimony about Petitioner’s background, including that he was born to an alcoholic
15 mother who prostituted herself, that she neglected Petitioner, resented him for being the
16 product of an affair and breaking up her marriage, and gave him a derogatory nickname,
17 that Petitioner was abused as a child by his stepfather, and that he started abusing
18 inhalants, alcohol, and other drugs at an extremely early age and had struggled with
19 substance abuse issues over several decades. Petitioner’s former counselors testified
20 about his efforts in substance abuse treatment and several former employers testified
21 about how Petitioner was reliable and a hard worker. While Petitioner now contends that
22 counsel could have presented additional details about Petitioner’s upbringing and the
23 surrounding community, as well as more concrete test results and evidence about his
24 organic brain damage and brain deficiencies, the Court rejected Petitioner’s claims of
25 ineffective assistance of counsel. The fact remains that the jury was aware of these
26 factors in mitigation, both Petitioner’s dysfunctional and disadvantaged upbringing as
27 well as his mental difficulties, and nevertheless voted to impose the death penalty.

28 Petitioner also contends that his punishment was disproportionate to his moral

1 culpability. Petitioner notes that this was a murder of a single victim and “when
2 compared with other death-eligible cases in which multiple murders, and in the case of
3 infamous capital cases in this district, where over 1,000 murders have been committed
4 by one person or organization, it is not the ‘worst case’ by the ‘worst offender.’”
5 (Traverse at 119.)

6 “Capital punishment must be limited to those offenders who commit ‘a narrow
7 category of the most serious crimes’ and whose extreme culpability makes them ‘the
8 most deserving of execution.’” Roper v. Simmons, 543 U.S. 551, 568 (2005), citing
9 Atkins, 536 U.S. at 319. Certain crimes have been exempted from capital punishment.
10 See e.g. Kennedy v. Louisiana, 554 U.S. 407, 437 (2008) (“As it relates to crimes against
11 individuals, though, the death penalty should not be expanded to instances where the
12 victim’s life was not taken.”); Enmund v. Florida, 458 U.S. 782, 797 (1982) (death
13 sentence violated Eighth Amendment where the defendant “aid[ed] and abet[ted] a
14 felony in the course of which a murder is committed by others but who does not himself
15 kill, attempt to kill, or intend that a killing take place or that lethal force will be
16 employed.”) Certain classes of offenders have also been declared ineligible for the death
17 penalty. See e.g. Roper, 543 U.S. at 571 (“Retribution is not proportional if the law’s
18 most severe penalty is imposed on one whose culpability or blameworthiness is
19 diminished, to a substantial degree, by reason of youth and immaturity.”); Hall v.
20 Florida, 572 U.S. ___, 134 S.Ct. 1986, 1992 (2014) (“No legitimate penological purpose
21 is served by executing a person with intellectual disability.”), citing Atkins, 536 U.S. at
22 317, 320.

23 While this crime involved a single murder victim, Petitioner fails to demonstrate
24 that the death penalty is disproportionate to his culpability. Petitioner was convicted of
25 murdering an elderly victim in her home, stabbing her repeatedly and slitting her throat,
26 leaving her to die from deprivation of oxygen and blood loss, in order to steal jewelry.
27 The victim’s age, condition, and vulnerability was known to him, as he had done yard
28 work for her and her husband, and was aware that her husband worked nights. He fled

1 the state, hid the proceeds of the burglary and robbery, and lied to the police in omitting
 2 that he had recently been in California. Again, the jury was aware of the mitigating
 3 circumstances concerning Petitioner's background, upbringing, and mental deficiencies,
 4 but still opted for the death penalty. The trial court, and later the California Supreme
 5 Court, upheld these findings. Petitioner fails to cite to any clearly established law
 6 indicating that the death penalty is a disproportionate punishment for a single murder
 7 victim. To the extent Petitioner contends that Petitioner's sentence should be compared
 8 to those rendered in other cases, as discussed in Claim 38, infra, comparative
 9 proportionality review is not constitutionally mandated.

10 Because Petitioner fails to demonstrate that the California Supreme Court's
 11 conclusion was contrary to, or an unreasonable application of, clearly established federal
 12 law, he is not entitled to habeas relief on Claim 32.

13 **4. Claim 33**

14 Petitioner contends that his death sentence "was rendered in violation of his rights
 15 under customary international law and *jus cogens*, which prohibit the execution of
 16 mentally disordered individuals, and are part of the federal law of the United States and
 17 thus the supreme law of the land under Article VI [sic], Section 2 of the Constitution of
 18 the United States (the 'Supremacy Clause')." (FAP at 401.)

19 Petitioner raised this contention as Claim 4 in the state habeas petition.
 20 (Lodgment No. 133.) The California Supreme Court rejected the claim on the merits and
 21 denied it on procedural grounds with a citation to Dixon, 41 Cal. 2d at 759. (Lodgment
 22 No. 144.) As discussed above in section III.A.1, Respondent has not carried the burden
 23 of showing that Dixon precludes the Court's review of Claim 33 on the merits.

24 Petitioner contends that "international law is our law" and that "[t]he prohibition
 25 against the imposition of the death penalty on the mentally disordered qualifies as legally
 26 binding international law." (FAP at 401-02.) Petitioner cites to statements and standards
 27 issued by the United Nations, the Council of Europe, the International Convention on the
 28 Elimination of All Forms of Racial Discrimination ["CERD"] and the International

1 Covenant on Civil and Political Rights [“ICCPR”] in support of his contentions. (FAP
 2 at 401-07, Traverse at 119-20.) However, Petitioner fails to offer any support for his
 3 contention that these international agreements and statements are enforceable on federal
 4 habeas review, nor does he cite to any clearly established law in support of this claim.
 5 Meanwhile, the Ninth Circuit has specifically held that “customary international law is
 6 not a source of judicially enforceable private rights in the absence of a statute conferring
 7 jurisdiction over such claims.” Serra v. Lappin, 600 F.3d 1191, 1197 (9th Cir. 2010).
 8 Accordingly, Claim 33 is without merit, as Petitioner “can point to no statute that brings
 9 [his] claim within [the Court’s] purview.” Id.

10 Given the lack of any clearly established federal law supporting this claim, the
 11 Court cannot conclude that the California Supreme Court’s rejection of this claim was
 12 either contrary to, or an unreasonable application of, clearly established federal law.
 13 Petitioner is not entitled to habeas relief on Claim 33.

14 **5. Claim 34**

15 Petitioner argues that his lengthy confinement under a death sentence, currently
 16 over twenty years, and the prospect of execution after such extended confinement,
 17 constitutes cruel and unusual punishment. (FAP at 407-08.) Petitioner contends that:

18 Carrying out Mr. Roybal’s death sentence after the inordinate delay
 19 described in this claim would violate the Eighth and Fourteenth
 20 Amendments because confinement of Mr. Roybal under a sentence of death
 21 for this extremely prolonged period of time constitutes cruel and unusual
 22 punishment in that it subjects Mr. Roybal to extraordinary psychological
 23 duress as well as the severe physical and social restrictions that inhere in
 life on death row, and because execution of Mr. Roybal so long after his
 conviction and judgment of death would be excessive, since the penalty
 would no longer serve the penological purposes either deterrence or
 retribution, which are the only legitimate and constitutionally recognized
 justifications for capital punishment.

24 (FAP at 408.)

25 Petitioner previously raised this claim as Claim 12 in the state habeas petition, and
 26 the California Supreme Court rejected it on the merits without a statement of reasoning.
 27 (See Lodgment Nos. 133, 144.)

28 “The Supreme Court has never held that execution after a long tenure on death row

1 is cruel and unusual punishment.” Allen v. Ornoski, 435 F.3d 946, 958 (9th Cir. 2006).
2 Indeed, the Supreme Court has repeatedly declined to address this question. See e.g.
3 Lackey v. Texas, 514 U.S. 1045 (1995) (mem.) (Stevens, J., discussing denial of
4 certiorari and observing that the claim has not been addressed, noting “the Court’s denial
5 of certiorari does not constitute a ruling on the merits”); see also Valle v. Florida, 564
6 U.S. ___, 132 S.Ct. 1 (2011) (mem.); Thompson v. McNeil, 556 U.S. 1114 (2009)
7 (mem.); Smith v. Arizona, 552 U.S. 985 (2007) (mem.); Foster v. Florida, 537 U.S. 990
8 (2002) (mem.). The Ninth Circuit has also held that Lackey claims are barred by Teague.
9 See Smith v. Mahoney, 611 F.3d 978, 998-99 (9th Cir. 2010) (“[A] state court
10 considering [Petitioner’s] Eighth Amendment claim at the time his conviction became
11 final would not have felt compelled by existing precedent to conclude that the rule
12 sought was required by the Constitution.”)

13 In support of his argument, Petitioner relies upon an 1890 United States Supreme
14 Court decision stating that “when a prisoner sentenced by a court to death is confined in
15 the penitentiary awaiting the execution of the sentence, one of the most horrible feelings
16 to which he can be subjected during that time is the uncertainty during the whole of it.”
17 (FAP at 409, Traverse at 121, quoting In re Medley, 134 U.S. 160, 172 (1890).)
18 Petitioner argues that because the length of time in Medley was four weeks, “as
19 recognized by Justice Stevens, *Medley*’s description should apply with even greater force
20 in a case such as this, involving a delay that has lasted over fifteen years.” (FAP at 49,
21 citing Lackey, 514 U.S. 1045.) However, in light of the fact that the Supreme Court has
22 on numerous occasions declined to address the claim advanced here, and that the Ninth
23 Circuit has explicitly stated that a Lackey claim does not find support in clearly
24 established law, Petitioner fails to demonstrate how Medley compels the result he seeks.

25 Recently, Petitioner also submitted as an exhibit several documents and orders
26 filed in a California capital habeas petition in another district court. (See ECF No. 262,
27 Ex. 68.) In that case, the petitioner raised a claim contending “that as a result of systemic
28 and inordinate delay in California’s post-conviction review process, only a random few

of the hundreds of individuals sentenced to death will be executed, and for those that are, execution will serve no penological purpose.” Jones v. Chappell, 31F.Supp.3d 1050 (C.D.Cal. 2014.) The district court vacated the petitioner’s death sentence, finding that California’s capital system was unconstitutional due to arbitrariness and delays in the post-conviction review process. Id. at 1054. This authority does not support Plaintiff’s argument because the Ninth Circuit recently reversed Jones, holding that Teague v. Lane, 489 U.S. 288 (1989) prevents the district court from “consider[ing] novel constitutional theories on habeas review.” Jones v. Davis, ___ F.3d ___. 2015 WL 6994287 (9th Cir. 2015). Petitioner simply fails to provide any clearly established authority in support of his contention. He has not demonstrated that the California Supreme Court’s rejection of this claim on appeal was either contrary to, or an unreasonable application of, clearly established federal law. Petitioner is not entitled to habeas relief on Claim 34.

6. Claim 35

Petitioner alleges that California’s death penalty statute “provides significantly fewer procedural protections for persons facing a death sentence than are afforded for persons charged with non-capital crimes.” (FAP at 412.) Respondent maintains that “[c]apital and non-capital defendants are not similarly situated, so the death penalty law does not violate equal protection by denying capital defendants certain procedural rights given to non-capital defendants.” (Ans. at 131.)

Petitioner’s specific arguments are that:

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. *See, e.g.,* California Penal Code §§ 1158, 1158a. No such unanimity is required before a juror can find that a particular fact is aggravating and militates in favor of death. *See, e.g., People v. Prieto*, 30 Cal.4th 226, 265 (2003). When a California judge in a non-capital case is considering which sentence is appropriate: “The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected.” California Rules of Court, Rule 4.42(e). No such requirement exists in a capital case. *See, e.g., People v. Fauber*, 2 Cal.4th 792, 859 (1992). Furthermore, in a non-capital case, “[c]ircumstances in aggravation and mitigation shall be established by a preponderance of the evidence.” Rule 4.42(b). There is no standard of proof in the penalty phase of a capital case. *See, e.g., People v. Hawthorne*,

1 *supra*, 4 Cal.4th at 79. In non-capital cases, defendants are entitled to
 2 disparate-sentence review. California Penal Code § 1170(d). Those
 3 sentenced to death are not. *See, e.g., People v. Crittenden*, 9 Cal.4th 87,
 153 (1994).

4 (FAP at 413-14.)

5 Petitioner raised this contention as Claim 14 in his state habeas petition and the
 6 California Supreme Court denied it on the merits without a statement of reasoning. (See
 7 Lodgment Nos. 133, 144.)

8 “The Equal Protection Clause of the Fourteenth Amendment commands that no
 9 State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’
 10 which is essentially a direction that all persons similarly situated should be treated alike.”
 11 City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985), quoting
 12 Plyler v. Doe, 457 U.S. 202, 216 (1982). The Supreme Court has noted that “the penalty
 13 of death is qualitatively different from a sentence of imprisonment, however long.”
 14 Woodson, 428 U.S. at 305. “Because of that qualitative difference, there is a
 15 corresponding difference in the need for reliability in the determination that death is an
 16 appropriate punishment in a specific case.” Id.

17 Again, the Ninth Circuit has held that “[t]he relevant comparison for equal
 18 protection purposes is between two defendants, both of whom are sentenced to death.”
 19 Massie, 875 F.2d at 1389. The Ninth Circuit has also specifically rejected an equal
 20 protection challenge to a state rule allowing for different filing deadlines in capital and
 21 non-capital petitions. See Rhoades v. Henry, 638 F.3d 1027, 1055 (9th Cir. 2011)
 22 (rejecting due process and equal protection challenge to Idaho statute “which imposes
 23 a forty-two day time limit for the filing of post-conviction proceedings in capital cases
 24 whereas non-capital defendants have five years within which to pursue post-conviction
 25 relief.”), citing Hoffman v. Arave, 236 F.3d 523 (9th Cir. 2001). Moreover, there are
 26 procedural protections afforded capital defendants that are not provided to non-capital
 27 defendants. Compare e.g., Beck v. Alabama, 447 U.S. 625, 638 (1980) (“[I]f the
 28 unavailability of a lesser included offense instruction enhances the risk of an

1 unwarranted conviction, [the State] is constitutionally prohibited from withdrawing that
2 option from the jury in a capital case.”) with Windham v. Merkle, 163 F.3d 1092, 1106
3 (9th Cir. 1998) (“Under the law of this circuit, the failure of a state trial court to instruct
4 on lesser included offenses in a non-capital case does not present a federal constitutional
5 question.”)

6 Ultimately, because Petitioner has not offered any clearly established law dictating
7 that the existence of different procedural rules for capital and non-capital defendants
8 violate equal protection principles, he fails to show that the California Supreme Court’s
9 rejection of this claim was contrary to, or an unreasonable application of, clearly
10 established federal law. Petitioner is not entitled to habeas relief on Claim 35.

11 **7. Claim 36**

12 Petitioner contends that the “California death penalty statute under which
13 Petitioner was convicted and sentenced to death fails to adequately narrow the class of
14 persons eligible for the death penalty and creates a substantial and constitutionally
15 unacceptable likelihood that the death penalty will be imposed in an arbitrary and
16 capricious fashion.” (FAP at 415.)

17 Respondent argues that the “United States Supreme Court has held that
18 California’s death penalty statute appropriately narrows the class of death-eligible
19 defendants and does not apply to every defendant convicted of murder. Tuilaepa v.
20 California, 512 U.S. 967, 972, 114 S. Ct 2630, 129 L. Ed. 2d 750 (1994).” (Ans. at 132.)
21 Petitioner contends that Tuilaepa is “not controlling,” and cites to Justice Blackmun’s
22 dissent and Justice Stevens’ concurrence, which each “noted that the question whether
23 the later California statute actually complied with Furman [v. Georgia, 408 U.S. 238
24 (1972)] remained open.” (Traverse at 115.)

25 “Furman mandates that where discretion is afforded a sentencing body on a matter
26 so grave as the determination of whether a human life should be taken or spared, that
27 discretion must be suitably directed and limited so as to minimize the risk of wholly
28 arbitrary and capricious action.” Gregg v. Georgia, 428 U.S. at 189 (plurality opinion).

1 “To pass constitutional muster, a capital sentencing scheme must ‘genuinely narrow the
2 class of persons eligible for the death penalty and must reasonably justify the imposition
3 of a more severe sentence on the defendant compared to others found guilty of murder.’”

4 Lowenfield v. Phelps, 484 U.S. 231, 244 (1988), quoting Zant, 462 U.S. at 877.

5 Petitioner argues that California’s 1978 death penalty statute, “which was enacted
6 by an initiative measure, violates the Eighth Amendment by multiplying the ‘few’ cases
7 in which the death penalty is possible into the many.” (FAP at 416.) He argues that at
8 the time Petitioner was charged, 28 special circumstances existed, “embracing every type
9 of murder likely to occur,” and the current statute contains 33 special circumstances.
10 (Id.) At the time he was charged with first-degree murder, Petitioner argues that 87% of
11 first-degree murderers were death-eligible under California law, while only 9.6% of
12 convicted first-degree murderers were sentenced to death. (Id. at 418.) Petitioner notes
13 that at the time of Furman, “the evidence before the high court established, and the
14 justices understood, that approximately 15-20% of those convicted of capital murder
15 were actually sentenced to death.” (Id. at 417.) He contends that California’s death
16 penalty law, in which such a high percentage of first-degree murders are death-eligible,
17 does not sufficiently narrow, and the percentage of those actually sentenced to death
18 demonstrates that the statute “permits an even greater risk of arbitrariness than the
19 schemes considered in Furman.” (Id. at 418-19.)

20 Petitioner asserts that “it is in this failure to ‘genuinely narrow’ that the California
21 death-eligible scheme fails.” (Traverse at 116.) However, Petitioner fails to offer
22 controlling authority that supports his argument. Petitioner cites to Wade v. Calderon,
23 29 F.3d 1312 (9th Cir. 1994), which involved a successful challenge to a jury instruction
24 on the torture-murder special circumstance. Id. at 1319, overruled on other grounds by
25 Rohan ex rel. Gates v. Woodford, 334 F.3d 803 (9th Cir. 2004). Yet Wade is not on
26 point, as Petitioner’s case does not involve the torture special circumstance nor any
27 corresponding error in articulating the elements of that circumstance to the jury. Instead,
28 Petitioner alleges that California’s statute as a whole is constitutionally infirm. The

1 Ninth Circuit has rejected this argument on several occasions. For instance, in Karis v.
 2 Calderon, 283 F.3d 1117 (9th Cir. 2002), the Ninth Circuit specifically rejected a
 3 constitutional challenge to California’s capital sentencing statute as a whole, concluding
 4 that:

5 With regard to this claim, we reject Karis’ argument that the scheme does
 6 not adequately narrow the class of persons eligible for the death penalty.
 7 The California statute satisfies the narrowing requirement set forth in *Zant*
 8 *v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). The
 9 special circumstances in California apply to a subclass of defendants
 10 convicted of murder and are not unconstitutionally vague. *See id.* at 972,
 11 103 S.Ct. 2733. The selection requirement is also satisfied by an
 individualized determination on the basis of the character of the individual
 and the circumstances of the crime. *See id.* California has identified a
 subclass of defendants deserving of death and by doing so, it has “narrowed
 in a meaningful way the category of defendants upon whom capital
 punishment may be imposed.” *Arave v. Creech*, 507 U.S. 463, 476, 113
 S.Ct. 1534, 123 L.Ed.2d 188 (1993).

12 Karis, 283 F.3d at 1141 n. 11; *see also* Mayfield v. Woodford, 270 F.3d 915, 924 (9th
 13 Cir. 2001) (en banc) (“A reasonable jurist could not debate, therefore, that the 1978
 14 California statute, which narrowed the class of death-eligible defendants at both the guilt
 15 and penalty phases, was constitutional.”)

16 Given the lack of clearly established federal law supporting Petitioner’s contention
 17 that the California capital statute runs afoul of the constitution, the Court cannot
 18 conclude that the California Supreme Court’s rejection of this claim was contrary to, or
 19 involved an unreasonable application of, clearly established federal law. Petitioner is not
 20 entitled to habeas relief on Claim 36.

21 **8. Claim 37**

22 Petitioner generally contends that the “California death penalty statute is
 23 unconstitutional on its face and as applied to Mr. Roybal” because the statute: (1) fails
 24 to explain which factors are mitigating and which are aggravating, (2) contains factors
 25 that are unconstitutionally vague, standardless, and fail to guide the jury in its penalty
 26 determination, (3) does not require written findings as to aggravating factors found true,
 27 (4) fails to require unanimity regarding finding an aggravating factor true, (5) fails to
 28 require that the jury unanimously and beyond a reasonable doubt find that the

1 aggravation outweighs the mitigation in order to arrive at a death verdict, (6) fails to
 2 provide for comparative appellate review, and (7) fails to require that inapplicable
 3 aggravating factors are excluded from the jury's consideration. (FAP at 419-20.)

4 Petitioner raised this argument as Claim 17 in his state habeas petition.
 5 (Lodgment No. 133.) The California Supreme Court denied the claim on the merits
 6 without a statement of reasoning. (Lodgment No. 144.)

7 **A. Statute Does Not Explain Which Factors are Mitigating and**
 8 **Which Are Aggravating**

9 In support of Claim 37, Petitioner generally asserts that "[s]ection 190.3 requires
 10 the sentencing body to consider a unitary list of factors without explaining which factors
 11 are aggravating and which are mitigating." (FAP at 419.)

12 Petitioner fails to cite any clearly established law supporting his claim. The Ninth
 13 Circuit has specifically rejected this contention. See Williams v. Calderon, 52 F.3d
 14 1465, 1484 (9th Cir. 1995) ("The death penalty statute's failure to label aggravating and
 15 mitigating factors is constitutional."), citing Harris v. Pulley, 692 F.2d 1189, 1994 (9th
 16 Cir. 1982), reversed on other grounds by Pulley v. Harris, 465 U.S. 37, 53-54 (1984).
 17 Moreover, the United States Supreme Court has also explicitly rejected the argument that
 18 a unitary list of factors rendered California's capital sentencing statute constitutionally
 19 infirm, as follows:

20 Petitioners also suggest that the §190.3 sentencing factors are flawed
 21 because they do not instruct the sentencer how to weigh any of the facts it
 22 finds in deciding upon the ultimate sentence. In this regard, petitioners'
 23 claim that a single list of factors is unconstitutional because it does not
 24 guide the jury in evaluating and weighing the evidence and allows the
 prosecution (as well as the defense) to make wide-ranging arguments about
 whether the defendant deserves the death penalty. This argument, too, is
 foreclosed by our cases. A capital sentencer need not be instructed how to
 weigh any particular fact in the capital sentencing decision.

25 Tuilaepa, 512 U.S. at 978-79.

26 In light of this authority, the Court cannot conclude that the California Supreme
 27 Court's rejection of this contention was either contrary to, or an unreasonable application
 28 of, clearly established federal law.

1 **B. Vague and Standardless Factors**

2 Petitioner contends that “[t]he section 190.3 factors are unconstitutionally vague
3 and standardless and fail to guide the jury in distinguishing between those defendants
4 who deserve the death penalty and those who do not.” (FAP at 419.)

5 Again, Petitioner fails to cite any clearly established law supporting his
6 contention. The Supreme Court has previously upheld the constitutionality of the
7 California death penalty statute, specifically rejecting challenges of vagueness as to
8 factors (a), (b), and (i). See Tuilaepa, 512 U.S. at 975-78. The Tuilaepa Court stated that
9 “vagueness review is quite deferential,” and explained that “a factor is not
10 unconstitutional if it has some ‘common-sense core of meaning . . . that criminal juries
11 should be capable of understanding.” Tuilaepa, 512 U.S. at 973, quoting Jurek, 428
12 U.S. at 279 (White, J., concurring).

13 In light of explicit authority upholding California’s capital statute in the face of
14 a vagueness challenge, Petitioner fails to demonstrate that the California Supreme
15 Court’s rejection of this claim was either contrary to, or an unreasonable application of,
16 clearly established federal law.

17 **C. Statute Does Not Require Written Findings**

18 Petitioner argues that California’s capital statute is unconstitutional because
19 “[t]here is no requirement of written findings on an aggravating factor found to be true.”
20 (FAP at 419.)

21 The Ninth Circuit has held that California’s death penalty statute “need not require
22 written jury findings in order to be constitutional.” Williams, 52 F.3d at 1484-85, citing
23 Harris, 692 F.3d at 1195-96, reversed on other grounds by Harris, 465 U.S. at 53-54.
24 Petitioner fails to cite any clearly established federal law supporting his contrary
25 contention.

26 In the absence of any such authority, this Court is unable to conclude that the
27 California Supreme Court’s rejection of this claim was either contrary to, or an
28 unreasonable application of, clearly established federal law.

D. Statute Does Not Require Unanimity Regarding Aggravating Factors

Petitioner generally asserts that “[t]here is no requirement of penalty jury unanimity regarding the presence of an aggravating factor found in support of the death judgment.” (FAP at 420.)

Petitioner does not offer substantive argument, or cite to any clearly established law, to support of his contention. As such, Petitioner has failed to demonstrate that the California Supreme Court’s rejection of this claim was either contrary to, or involved an unreasonable application of, clearly established federal law.

E. Statute Does Not Require Unanimity Beyond a Reasonable Doubt As To the Penalty Decision

Here, Petitioner generally asserts that “[t]here is no requirement that the penalty jury determine beyond a reasonable doubt and unanimously that the aggravating circumstances outweigh the mitigating circumstances and that death is the appropriate penalty beyond a reasonable doubt.” (FAP at 420.)

Again, Petitioner fails to offer any substantive argument, or cite to any clearly established law, supporting this contention. As noted above in the discussion of Claim 37.a, the United States Supreme Court has upheld the California capital statute and stated that: “A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision.” Tuilaepa, 512 U.S. at 979 (““Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment.””), quoting Ramos, 463 U.S. at 1008. Moreover, the Ninth Circuit rejected a similar challenge to California’s capital sentencing statute. See Williams, 52 F.3d at 1485 (“[T]he failure of the statute to require a specific finding that death is beyond a reasonable doubt the appropriate penalty does not render it unconstitutional.”)

Petitioner fails to demonstrate that the California Supreme Court’s rejection of this

claim was either contrary to, or an unreasonable application of, clearly established federal law.

F. Statute Does Not Require Comparative Appellate Review

Petitioner also asserts that the statute is constitutionally infirm because “[t]here is no provision for comparative appellate review to prevent inconsistency, disproportionality, and discrimination.” (FAP at 420.) This contention appears similar to Claim 38, in which Petitioner contends that California’s death penalty statute, as interpreted by the California Supreme Court, forbids comparative proportionality review.

As discussed in Claim 38, infra, the Harris Court upheld California’s capital sentencing statute despite the fact that the statute did not require proportionality review. See id., 465 U.S. at 50-51 (“There is thus no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it.”) Also, as discussed below, both the Supreme Court and Ninth Circuit have rejected challenges to the constitutionality of California’s capital sentencing statute despite the statute’s lack of comparative proportionality review. (See Claim 38, citing Harris, 465 U.S. at 43-46 and Allen v. Woodford, 395 F.3d 979, 1018 (9th Cir. 2005).)

Given the lack of any controlling authority in support of his contention, Petitioner fails to demonstrate that the California Supreme Court’s rejection of this claim was either contrary to, or an unreasonable application of, clearly established federal law.

G. Statute Does Not Exclude Inapplicable Factors in Aggravation

Petitioner also contends that California’s capital statute is unconstitutional because “[t]here is no requirement that non-statutory unspecified or non-applicable aggravating factors be excluded from juror consideration.” (FAP at 420.)

This contention has been rejected by both the United States Supreme Court and the Ninth Circuit. The Ninth Circuit held:

Nothing in the Constitution limits the consideration of nonstatutory aggravating factors. See Barclay v. Florida, 463 U.S. 939, 956, 103 S.Ct 3418, 77 L.Ed.2d 1134 (1983) (holding that nothing in the Constitution prohibits consideration of non-statutory aggravating factor); Harris v.

1 Pulley, 692 F.2d 1189, 1193-94 (9th Cir. 1982) (rejecting the argument that
 2 California death penalty statute is unconstitutional because it places no
 3 limit on the introduction of aggravating factors), *rev'd in part on other*
grounds, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984).

4 Babbitt v. Calderon, 151 F.3d 1170, 1178 (9th Cir. 1998).

5 Petitioner fails to demonstrate that the California Supreme Court's rejection of this
 6 claim was contrary to, or an unreasonable application of, clearly established federal law.
 7 Petitioner is not entitled to habeas relief on Claim 37.

8 **9. Claim 38**

9 Petitioner asserts that California's capital sentencing statute not only fails to
 10 properly narrow the class of death-eligible defendants and lacks a number of procedural
 11 safeguards, but that "[t]he lack of comparative proportionality review has deprived
 12 California's sentencing scheme of the only mechanism that might have enabled it to
 13 'pass constitutional muster.'" (FAP at 421.)

14 Petitioner raised this contention as Claim 18 in the state habeas petition, and the
 15 California Supreme Court rejected the claim on the merits without a statement of
 16 reasoning. (See Lodgment Nos. 133, 144.)

17 Petitioner argues that "[t]wenty-nine of the thirty-eight states that have reinstated
 18 capital punishment require comparative, or 'inter-case,' appellate sentence review,"
 19 while California's statute has no such requirement. (FAP at 422-23.) Petitioner asserts
 20 that the California statute also does not preclude such review, and that "[t]he prohibition
 21 on the consideration of any evidence showing that death sentences are not being charged
 22 or imposed on similarly situated defendants is strictly the creation of this Court. See,
 23 e.g., People v. Marshall, 50 Cal.3d 907, 946-947 (1990)." (Id. at 423.) Petitioner argues
 24 that "this Court's categorical refusal to engage in inter-case proportionality review now
 25 violates the Eighth Amendment." (Id.)

26 As noted in the discussion of Claim 37, supra, Petitioner's contention fails to find
 27 support in clearly established law. In fact, the Ninth Circuit specifically rejected the
 28 contention that the 1978 California death penalty statute violates the constitution due to
 a lack of proportionality review, reasoning that such an "argument is foreclosed by the

Supreme Court's holding in Pulley v. Harris, 465 U.S. 37, 43-46, 104 S.Ct 871, 79 L.Ed.2d 29 (1984), that neither the Eighth Amendment nor due process requires proportionality review in imposing the death penalty." Allen, 395 F.3d at 1018. As the Harris Court clearly indicated that proportionality review is not constitutionally compelled, Petitioner's argument that the California Supreme Court's failure to conduct such review violated the federal constitution is accordingly without merit.

In sum, as Petitioner fails to demonstrate that the California Supreme Court's rejection of this claim was either contrary to, or an unreasonable application of, clearly established federal law, habeas relief is not warranted on Claim 38.

F. ATKINS CLAIM AND CUMULATIVE ERROR

1. Claim 11

Petitioner contends that available evidence "demonstrates that Mr. Roybal's death sentence was imposed for behaviors he lacked the capacity to comprehend, modulate, control or avoid," and argues that his death sentence "is an unconstitutional punishment because evolving standards of decency prohibit the execution of a person for conduct he was unable to control." (FAP at 286.)

Petitioner raised this contention as Claim 3 in the state habeas petition, and the California Supreme Court rejected the claim on the merits without a statement of reasoning. (See Lodgment Nos. 133, 144.)

"[T]he Eighth and Fourteenth Amendments to the Constitution forbid the execution of persons with intellectual disability." Hall, 134 S.Ct. at 1990, citing Atkins, 536 U.S. at 321. California has implemented rules and procedures to adjudicate claims of intellectual disability,⁴⁰ defining the term as follows: "As used in this section, 'intellectual disability' means the condition of significantly subaverage intellectual

⁴⁰ The current version of section 1376 uses the term "intellectual disability," replacing the term "mentally retarded," which was used in a prior version of the statute. This change in terminology has been adopted by numerous courts and organizations, including the Supreme Court. See e.g. Hall, 134 S.Ct. at 1990 ("Previous opinions of this Court have employed the term 'mental retardation.' This opinion uses the term 'intellectual disability' to describe the identical phenomenon.")

1 functioning existing concurrently with deficits in adaptive behavior and manifested
 2 before 18 years of age.” Cal. Penal Code § 1376(a). California’s definition of
 3 intellectual disability appears consistent with both the definition articulated by the
 4 Supreme Court and as used in the medical community.⁴¹ See Hall, 134 S.Ct. at 1994
 5 (“As the Court noted in Atkins, the medical community defines intellectual disability
 6 according to three criteria: significantly subaverage intellectual functioning, deficits in
 7 adaptive functioning (the inability to learn basic skills and adjust behavior to changing
 8 circumstances), and the onset of these deficits during the developmental period.”), citing
 9 Atkins, 536 U.S. at 308, n. 3.

10 In order to demonstrate a post-conviction claim of intellectual disability under
 11 section 1376, the California Supreme Court requires a prisoner to submit a habeas
 12 petition and accompanying expert declaration. See Hawthorne, 35 Cal. 4th at 47. “[T]he
 13 expert’s declaration must set forth a factual basis for finding the petitioner has
 14 significantly subaverage intellectual functioning and deficiencies in adaptive behavior
 15 in the categories enumerated above. The evidence must also establish that the
 16 intellectual and behavioral deficits manifested prior to the age of 18.” Id. at 48. In state
 17 court, Petitioner presented expert declarations, medical and psychiatric records,
 18 declarations from family members, and social history information, in addition to
 19 information about his IQ test scores. As noted above, the California Supreme Court
 20 denied the claim on the merits without a statement of reasoning.

21
 22 ⁴¹ In a prior motion, Petitioner contended that the Hall decision rendered his Atkins
 23 claim unexhausted and requested a stay in order to again present this claim to the
 24 California Supreme Court. (See ECF No. 246.) The Hall Court rejected Florida’s “rigid
 25 rule,” which “defines intellectual disability to require an IQ test score of 70 or less” and
 26 refuses to consider additional evidence if IQ testing is above that cutoff, as
 27 unconstitutional. Hall, 134 S.Ct. at 1990. The California Supreme Court specifically
 28 declined to adopt an IQ cutoff like the one at issue in Hall, explaining that “a fixed cutoff
 is inconsistent with established clinical definitions and fails to recognize that
 significantly subaverage intellectual functioning may be established by means other than
 IQ testing.” In re Hawthorne, 35 Cal. 4th 40, 48 (2005). Section 1376 also provides for
 the presentation of other evidence of intellectual disability even if an IQ score is above
 70. Id. Thus, as the Court previously held in denying Petitioner’s motion for a stay,
 Petitioner “fails to persuasively explain how the procedures currently implemented by
 California courts for the analysis and resolution of claims of intellectual disability by
 capital petitioners are materially impacted by Hall.” (ECF No. 261 at 5.)

1 In his instant claim in the FAP, Petitioner has again presented the materials
2 previously presented to the state court, including numerous tests performed on Petitioner
3 in 1992 by Dr. Friedman, including an IQ test, and numerous tests performed in 2006 by
4 Dr. Wegman, which also included an IQ test. (Exs. 9, 12, Lodgment No. 134.)
5 Petitioner relies heavily on the declaration of Dr. Jeffrey Victoroff, a physician who is
6 board certified in neurology and psychiatry, in support of this claim. (See FAP at 284-
7 87.) Also included is a declaration from Dr. Timmen Cermak, who testified at the
8 penalty phase proceedings, as well as Petitioner's medical and correctional records. The
9 Court has reviewed these documents, and fails to find support for a conclusion that
10 Petitioner is intellectually disabled. That is, Petitioner fails to demonstrate "significantly
11 subaverage intellectual functioning and deficiencies in adaptive behavior" and "that the
12 intellectual and behavioral deficits manifested prior to the age of 18." Hawthorne, 35
13 Cal. 4th at 47-48. Indeed, none of the expert declarations Petitioner submits indicate that
14 Petitioner is intellectually disabled.

15 Instead, the experts offer varying opinions touching on different aspects of
16 Petitioner's cerebral functioning and the causes of his behavior. The experts appear to
17 agree that Petitioner has impairments in functioning, but there is conflicting evidence on
18 the severity of the impairments and whether Petitioner displays deficiencies in adaptive
19 behavior. Finally, Petitioner fails to offer any support that the asserted deficits
20 manifested prior to the age of 18.

21 A review of the record reveals that IQ testing performed at different points in
22 Petitioner's life consistently reflect that Petitioner was in the average, low-average, or
23 dull normal ranges. For instance, in 1976, when Petitioner was in his early 20's, medical
24 records indicate an: "Estimate of intelligence dull normal." (Ex. 15, Lodgment No. 135
25 at 263.) In 1979, records reflect that Petitioner "appeared to be of average intelligence,
26 but demonstrated poor judgement through his drinking." (Ex. 17, Lodgment No. 135 at
27 277.) In 1982 and 1983 admissions, Petitioner's IQ was estimated to be "average." (Ex.
28 18, Lodgment No. 135 at 282, 288.) A 1986 diagnostic evaluation measured Petitioner's

1 IQ at 73, and indicated that: “When compared to others in his age group, he scores within
2 the Borderline range of intelligence.” (Ex. 21, Lodgment No. 135 at 315.) The
3 evaluation noted the possibility of either a learning disability or that his results were due
4 to inhalant and alcohol abuse, and stated that: “He answered all questions in a polite and
5 cooperative manner and provided additional relevant information. His speech was fluid
6 and clear with an adequate command of vocabulary and ability to abstract.” (Id. at 314.)

7 Dr. Wegman’s 2007 evaluation revealed that: “Mr. Roybal has mild cerebral
8 impairment which adversely affects his ability to inhibit automatic responses,
9 particularly when he is under pressure.” (Ex. 9, Lodgment No. 134 at 78.) In discussing
10 the test data, Dr. Wegman stated that: “His IQ is below average but nevertheless within
11 broad normal limits; he has adequate basic skills in reading, writing and arithmetic; and
12 he can communicate and interact normally.” (Id. at 76.) Far from supporting Petitioner’s
13 argument, Dr. Wegman’s evaluation appears to contradict the assertions made in this
14 claim, as the expert indicates that any impairment was “mild,” that Petitioner’s IQ was
15 “within broad normal limits,” and did not indicate any deficits in adaptive functioning,
16 characterizing those abilities as “adequate.”

17 Dr. Koshkarian, who interviewed Petitioner in advance of trial in 1992, offered
18 some indication of deficits in adaptive behavior and functioning, as Petitioner reported
19 that school was “always difficult for him,” he repeated two grades, and he dropped out
20 in the 7th grade. (Ex. 11, Lodgment No. 134 at 122.) However, Petitioner also
21 explained that he spoke Spanish at home, and that it was therefore difficult to speak
22 English at school. (Id.) Moreover, Petitioner also spent time in the Job Corps, learned
23 vocational skills, and once worked three jobs at a time. (Id.) Thus, the language
24 differences could reasonably explain some of Petitioner’s academic difficulties, while
25 the Job Corps and other work experience appears to demonstrate some measure of
26 adaptive behavior, which does not support a claim of intellectual disability. While Dr.
27 Koshkarian indicated that Petitioner was of “limited intelligence and social skills” and
28 would function best in an institutional setting, stating that: “This fits his personality

1 which has limited his ability to function adequately and successfully in the community,”
2 the expert did not conclude that Petitioner was intellectually disabled. (Id. at 123.)
3 Instead, Dr. Koshkarian concluded as follows: “He showed no evidence of psychotic
4 behavior or thinking and I estimated his intelligence to be in the below average range.
5 His memory and ability for abstract thinking, consistent with his intelligence, was intact
6 and there was no clinical evidence of an organic brain syndrome.” (Id. at 118.)

7 Dr. Meredith Friedman, who also evaluated Petitioner in 1992 in advance of trial,
8 indicated that Petitioner had “difficulty understanding questions which oftentimes had
9 to be repeated,” but also stated that: “His thinking was logical and goal-oriented.” (Ex.
10 12, Lodgment No. 134 at 126.) As for Petitioner’s intelligence, Dr. Friedman stated that
11 one test result indicated a “Low Average range of ability” and explained that differences
12 in percentiles in the performance and verbal portions of the test “has been associated
13 with bilingual impoverishment, and learning disabilities,” noting that the verbal IQ
14 portion was “borderline.” (Id.) On the Weschler IQ test, Petitioner scored an 83, which
15 Dr. Friedman indicated was in the “Low Average range of ability” and again noted the
16 differences between Petitioner’s between performance and verbal IQ. (Id. at 127.) Dr.
17 Friedman also wrote that: “Limitations with reading, writing, naming objects (expressive
18 aphasia) and understanding speech (receptive aphasia) are suggested as well as overall
19 reduced intelligence.” (Id. at 128.) In her conclusions, Dr. Friedman noted: “Axis II: 1.
20 Borderline Intellectual Functioning (I.Q. of 71 to 84).” (Id.)

21 At trial, both Dr. Cermak, for the defense, and Dr. Bucky, in rebuttal for the
22 prosecution, addressed the implications of Dr. Friedman’s test results. Dr. Cermak
23 testified at trial that Petitioner’s IQ tests indicated Petitioner was “borderline mentally
24 retarded.” (RT 6067.) Dr. Cermak cited in particular the difference between Petitioner’s
25 performance and verbal IQ’s, as tested by Dr. Friedman, and stated that the results of
26 those and other tests “demonstrated that it is very, very likely that what we’re dealing
27 with is organic brain damage.” (RT 6067-70.) He stated that the damage “was almost
28 certainly genetic.” (RT 6071.)

1 Meanwhile, Dr. Bucky stated that “the evidence from the intelligence test was
2 inconsistent with an individual that’s retarded.” (RT 6274.) He testified as follows:

3 You would say from the scores that I observed here that this is an individual
4 functioning in the low-average range of intelligence. Average range is 90
5 to 100, low-average range is from 80 to 89. My best judgment is that this
individual is functioning at the lower end of the low-average range of
intelligence, which is not somebody who is retarded.

6 (RT 6274-75.) Dr. Bucky also stated that the test results “indicate no observable organic
7 brain damage.” (RT 6276.) He indicated that he was not saying Dr. Friedman was
8 wrong in finding organic brain damage, but stated instead that “if there is brain
9 dysfunction, it is very subtle.” (Id.)

10 Dr. Cermak submitted a post-trial declaration in which he discussed how
11 additional testing and information about Petitioner’s background would have informed
12 his opinion and changed the testimony he provided at the penalty phase in several
13 respects and strengthened his opinion that Petitioner had organic brain damage, but did
14 not specifically address whether or not Petitioner was intellectually disabled. (See Ex.
15 60, Lodgment No. 142.)

16 Again, Petitioner primarily cites Dr. Victoroff’s evaluation, who, after extended
17 discussion of Petitioner’s history, testing, and evaluation, concluded: “In my opinion, as
18 the result of a combination of inhalant neurotoxicity, alcohol abuse, and traumatic brain
19 injuries, Mr. Roybal has now and had in 1989 an abnormal brain and multifaceted
20 organic brain disorder.” (Ex. 10, Lodgment No. 134 at 101.) Dr. Victoroff discussed a
21 myriad of possible or probable causes for Petitioner’s brain damage, and concluded that
22 there was “very strong evidence that in 1989 at the time of the instant offense and in
23 1992 at the time of the trial, Mr. Roybal suffered from neurologically significant brain
24 damage due to an extraordinarily long and frequent exposure to neurotoxic inhalants.”
25 (Id. at 99.) Yet, while Dr. Victoroff discussed Petitioner’s history at length and
26 addressed a myriad of potential causes for Petitioner’s functioning at the time of the
27 offense in 1989 and the time of trial in 1992, he did not offer any specific conclusions
28 about Petitioner’s functioning prior to the age of 18. Dr. Victoroff discussed the

1 potential impact of Petitioner's inhalant abuse, early alcohol use, and later brain injuries,
 2 the possible impact of his mother's drinking, the possible impact of parental abuse and
 3 neglect, and the probable impact of his own substance use and abuse, but similarly
 4 absent from his declaration is any conclusion or opinion that Petitioner is intellectually
 5 disabled.

6 Thus, the fact remains that none of the experts whose declarations have been
 7 submitted in support of this claim actually conclude that Petitioner meets the definition
 8 of intellectual disability. Under California law:

9 To state a prima facie claim for relief, the petition must contain 'a
 10 declaration by a qualified expert stating his or her opinion that the
 11 (petitioner) is mentally retarded . . . ' (§1376 subd. (b)(1).) Not only must
 12 the declarant be a qualified expert, i.e., an individual with appropriate
 education, training, and experience, the declaration must explain the basis
 for the assessment of mental retardation in light of the statutory standard.

13 Hawthorne, 35 Cal. 4th at 47. Given the lack of any expert declaration concluding that
 14 Petitioner is intellectually disabled and outlining how Petitioner meets the criteria, it
 15 appears clear that Petitioner did not state a prima facie case for relief before the
 16 California Supreme Court. The Atkins Court specifically left "to the State(s) the task of
 17 developing appropriate ways to enforce the constitutional restriction upon (their)
 18 execution of sentences." Atkins, 536 U.S. at 317, citing Ford v. Wainwright, 477 U.S.
 19 399, 405, 416-17 (1986). As discussed above, California's definition of intellectual
 20 disability appears to comport with the definition articulated by the Supreme Court and
 21 used within the medical community. See Hall, 134 S.Ct. at 1994. Because Petitioner
 22 failed to state a prima facie case for relief, the California Supreme Court's rejection of
 23 this claim was reasonable.

24 As a part of this claim, Petitioner also separately argues that his impairments
 25 rendered him incompetent to stand trial, asserting that:

26 Mr. Roybal suffered from myriad, serious mental and neurological
 27 impairments, all of which individually and in combination effected [sic] his
 28 abilities [sic] to make reasoned judgments, to rationally and effectively
 modulate his impulses and behaviors, to understand the consequences of his
 actions, to exercise volitional control of his behavior, and to meaningfully

1 comprehend and follow the capital trial proceedings and assist in his own
2 defense. These mental impairments include, but are not limited to,
neuropsychological deficits in his brain function.

3 (FAP at 285-86.) Petitioner contends that “the additional facts regarding Mr. Roybal’s
4 borderline retardation, combined with additional evidence he suffered organic brain
5 damage and possibly the Fetal Alcohol Effect [Petitioner’s Exhibit 10, ¶ 46, Victoroff
6 declaration, p.97], established a *prima facie* case Mr. Roybal was not competent to stand
7 trial.” (FAP at 287.)

8 “[T]he standard for competence to stand trial is whether the defendant has
9 ‘sufficient present ability to consult with his lawyer with a reasonable degree of rational
10 understanding’ and has ‘a rational as well as factual understanding of the proceedings
11 against him.’” Godinez v. Moran, 509 U.S. 389, 396 (1993), quoting Dusky v. United
12 States, 362 U.S. 402 (1960) (per curiam); see also Drope v. Missouri, 420 U.S. 162, 171
13 (1975) (“It has long been accepted that a person whose mental condition is such that he
14 lacks the capacity to understand the nature and object of the proceedings against him, to
15 consult with counsel, and to assist in preparing his defense may not be subjected to a
16 trial.”)

17 A review of the record does not reflect that anyone involved in the trial voiced a
18 concern about Petitioner’s competence to stand trial. There is no indication that a
19 competency hearing was ordered, or ever contemplated. Indeed, the record reflects a
20 number of occasions where Petitioner interacted with the trial court- for instance, in
21 order to waive his personal presence at hearings, to enter a plea, and for other procedural
22 matters and that Petitioner was responsive upon inquiry by with the trial court. (See e.g.,
23 RT 157-58 (waiver of presence at discussion regarding scheduling of voir dire
24 proceedings), RT 540-41 (same), RT 570-71 (waiver of presence at sidebar discussions
25 on minor issues), RT 576-77 (entry of not guilty plea and denial on charged special
26 circumstances and priors).)

27 In support of this contention, Petitioner cites to a section in the Victoroff
28 declaration where the expert discusses the possibility that Petitioner suffered brain

1 damage and the Fetal Alcohol Effect due to his mother's drinking. (See FAP at 287,
2 citing Ex. 10, Lodgment No. 134 at 97.) But Dr. Victoroff does not indicate any concern
3 that Petitioner was unable to understand the trial proceedings, communicate with
4 counsel, or assist in his own defense. Nor does Petitioner cite to any evidence or expert
5 opinion stating that Petitioner was not competent to stand trial. Mental health experts,
6 who examined and interacted with Petitioner in 1992 and 2006, respectively, did not
7 indicate any concerns that Petitioner was not competent to stand trial. Meredith
8 Friedman, Ph.D., who examined Petitioner in 1992, stated that: "Mr. Roybal presented
9 as a soft-spoken individual who was extremely cooperative and pleasant with this
10 examiner. It was noted that he had some difficulty understanding some questions which
11 oftentimes had to be repeated." (Ex. 12, Lodgment No. 134 at 126.) Meanwhile,
12 Thomas Wegman, Ph.D., indicated that with respect to his 2006 examination, which took
13 place over the span of three days: "At each of the three examination sessions, he was
14 energetic, lively, alert and well-oriented in all respects" and that Petitioner "paid
15 attention and responded intelligently to my questions. He had a normal understanding
16 of directions during my examination of him, and there was minimal need for repetition."
17 (Ex. 9, Lodgment No. 134 at 66.) Both trial counsel have also submitted declarations in
18 support of the habeas petition (see Exs. 66, 67), yet neither attorney stated that Petitioner
19 was either unable to understand the proceedings, communicate with counsel, or assist in
20 his own defense. See Hernandez v. Ylst, 930 F.2d 714, 718 (9th Cir. 1991) ("While the
21 opinion of [defendant's] counsel certainly is not determinative, a defendant's counsel is
22 in the best position to evaluate a client's comprehension of the proceedings."); see also
23 Medina v. California, 505 U.S. 437, 450 (1992).

24 Petitioner does not offer any record support for his contention that he was unable
25 to understand the proceedings against him or communicate with and assist counsel in
26 preparing his defense at trial. In the absence of any indication from those involved in
27 the trial proceedings, such as the trial court, counsel, or the examining experts that
28 Petitioner was incompetent, this claim fails on the merits.

Petitioner fails to demonstrate that the California Supreme Court's rejection of Claim 11 was either contrary to, or an unreasonable application of, clearly established federal law or that it was based on an unreasonable determination of the facts. Petitioner requests an evidentiary hearing as to "[w]hether Mr. Roybal is eligible for the death penalty under Hall v. Florida," and proposes to call Drs. Wegman and Victoroff as witnesses to determine "[w]hat information Drs. Wegman and Victoroff have reviewed, either from Mr. Roybal's medical and educational records, test results obtained prior to his trial, or their own test results, that indicate Mr. Roybal suffers from an intellectual disability as defined by the United States Supreme Court in Hall, and the extent of that disability." (Pet. EH Mem. at 17-18.) However, both Drs. Wegman and Victoroff have submitted declarations in support of the state and federal habeas petitions, outlining the tests they reviewed, conducted, and/or relied upon in rendering their opinions as to Petitioner's mental health. Neither expert has opined that Petitioner is intellectually disabled, nor has either expert discussed how Petitioner meets the criteria for such a diagnosis, as state law requires. Given Petitioner's failure to present a prima facie case for relief before the state court, the California Supreme Court's rejection of this claim was not unreasonable and an evidentiary hearing is not warranted on Claim 11. See Schriro v. Landrigan, 550 U.S. 465, 474 (2007) ("Because the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate."); see also Sully, 725 F.3d at 1075 ("[A]n evidentiary hearing is pointless once the district court has determined that § 2254(d) precludes habeas relief."). Petitioner is not entitled to habeas relief on Claim 38.

2. Claim 39

Petitioner contends that his conviction, sentence and imprisonment were obtained in violation of his constitutional rights "in light of the multiple constitutional errors committed by the prosecutor, trial counsel and the trial court and which together rendered Mr. Roybal's trial fundamentally unfair and rendered the resulting verdicts and

1 judgments unreliable.” (FAP at 424.)

2 Petitioner raised a cumulative error claim on direct appeal, raising allegations of
3 prosecutorial misconduct, trial court error, and ineffective assistance of counsel, which
4 the California Supreme Court rejected, reasoning: “Defendant contends that the
5 cumulative prejudice of prosecutorial misconduct and the superior court’s errors at the
6 guilt and penalty phases require reversal. We have concluded that none of the
7 defendant’s claims was meritorious. Accordingly, we also reject his claim that
8 cumulative error affected the process or result of the trial to his detriment.” Roybal, 19
9 Cal. 4th at 531. Petitioner re-raised this claim as Claim 20 in his state habeas petition,
10 raising additional allegations of trial error, prosecutorial misconduct, and ineffective
11 assistance of counsel. (Lodgment No. 133.) The California Supreme Court rejected that
12 claim on the merits without a statement of reasoning. (Lodgment No. 144.)

13 “The Supreme Court has clearly established that the combined effect of multiple
14 trial court errors violates due process where it renders the resulting criminal trial
15 fundamentally unfair.” Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007), citing
16 Chambers v. Mississippi, 410 U.S. 284, 298, 302-03 (1973); see also Killian v. Poole
17 (9th Cir. 2002) (“[E]ven if no single error were prejudicial, where there are several
18 substantial errors, ‘their cumulative effect may nevertheless be so prejudicial as to
19 require reversal.’”), quoting United States v. de Cruz, 82 F.3d 856, 868 (9th Cir. 1996).

20 As a practical matter, it appears redundant to decide this claim, as the Court has
21 already concluded Petitioner is entitled to penalty phase habeas relief as the result of two
22 separate, and individually prejudicial, constitutional violations. First, the Court found
23 that the California Supreme Court’s harmless error analysis was unreasonable with
24 respect to Petitioner’s claim of prosecutorial misconduct raised as Claim 12. The Court
25 also held that the claim, on its own, satisfied Brecht, and that the error in arguing to the
26 jurors that the Bible mandated a death sentence in his case had a “substantial and
27 injurious effect of influence” in the jury’s sentencing determination, given the severity
28 of the misconduct and the closeness of the penalty phase case. The Court also separately

1 concluded that the state court unreasonably rejected Petitioner's related claim of
2 ineffective assistance of counsel, raised as Claim 9, and that trial counsel's failure to
3 object to the prosecutorial misconduct constituted prejudicially deficient performance.

4 Because each of the claims identified above warrant penalty phase habeas relief,
5 granting relief based on the cumulative impact of these errors merely offers another route
6 to the same outcome. However, in an abundance of caution and as an alternative ground
7 for the Court's determination that penalty phase relief is warranted in this case, the Court
8 also concludes that the California Supreme Court's rejection of his claim of cumulative
9 error was objectively unreasonable and that Petitioner warrants habeas relief due to the
10 cumulative impact of these specific errors at his penalty phase proceedings.

11 The California Supreme Court rejected this claim on direct appeal, reasoning that
12 cumulative error did not negatively impact his case based on the determination that: "We
13 have concluded that none of the defendant's claims was meritorious." Roybal, 19 Cal.
14 4th at 531. In doing so, the state court failed to acknowledge that cumulative error
15 analysis does not require independently meritorious claims, but instead provides an
16 avenue for relief in the event of multiple errors that only amounted to prejudice when
17 considered together. Instead of addressing and evaluating the impact of these errors,
18 such as the acknowledged instance of "clear misconduct" by the prosecutor in
19 advocating a death sentence on biblical grounds, the California Supreme Court simply
20 concluded that because none of Petitioner's claims was independently meritorious, the
21 cumulative error claim necessarily failed as well. This determination was both incorrect
22 and unreasonable.

23 Reviewing Petitioner's contentions as a whole, including the prosecutor's
24 misconduct quoting from the Bible in his closing argument and urging the jury that
25 biblical law demanded a death sentence, the deficiencies of trial counsel in failing to
26 object to the misconduct and request a curative instruction, in combination with any
27 other potential errors that, individually, do not rise to the level of a constitutional
28 violation, the Court is persuaded that Petitioner has shown a due process violation. See

1 Parle, 505 F.3d at 927 (“The cumulative effect of multiple errors can violate due process
 2 even where no single error rises to the level of a constitutional violation or would
 3 independently warrant reversal.”), citing Chambers, 410 U.S. at 290 n.3. In making this
 4 determination, the Court is cognizant not only of the jury’s extreme difficulty in
 5 rendering a penalty phase decision, but also the significant evidence in mitigation
 6 presented during Petitioner’s penalty phase proceedings, such as Petitioner’s upbringing,
 7 which was replete with abuse and severe neglect, his early and continued use and abuse
 8 of alcohol and drugs, testimony that Petitioner suffered from organic brain damage,
 9 blackouts, and the possibility of fetal alcohol effects due to his mother’s alcohol abuse
 10 during pregnancy. For these reasons, as well as those discussed above with respect to
 11 Claims 9 and 12, the Court is persuaded that these errors, considered together, as well
 12 as in conjunction with Petitioner’s other penalty phase claims, had a “substantial and
 13 injurious effect or influence” on the jury’s penalty determination. Brecht, 507 U.S. at
 14 637. Accordingly, the Court concludes that Petitioner is entitled to penalty phase habeas
 15 relief on Claim 39.

16 VI. CERTIFICATE OF APPEALABILITY

17 28 U.S.C. § 2253 provides for a “certificate of appealability” for § 2254 cases
 18 under the following circumstances:

19 (1) Unless a circuit justice or judge issues a certificate of appealability, an
 20 appeal may not be taken to the court of appeals from—

21 (A) the final order in a habeas corpus proceeding in which the
 22 detention complained of arises out of process issued by a State court;

or

22 (B) the final order in a proceeding under section 2255.

23 (2) A certificate of appealability may issue under paragraph (1) only if the
 24 applicant has made a substantial showing of the denial of a constitutional
 right.

25 (3) The certificate of appealability under paragraph (1) shall indicate which
 26 specific issue or issues satisfy the showing required by paragraph (2).

27 “Where a district court has rejected the constitutional claims on the merits, the
 28 showing required to satisfy section 2253(c) is straightforward: The petitioner must

1 demonstrate that reasonable jurists would find the district court's assessment of the
 2 constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484
 3 (2000); see also Miller-El v. Cockrell, 537 U.S. 322, 338 (2003) ("Indeed, a claim can
 4 be debatable even though every jurist of reason might agree, after the COA has been
 5 granted and the case has received full consideration, that Petitioner will not prevail.")

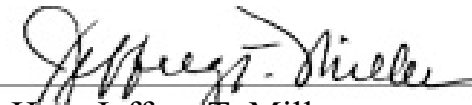
6 A claim may also warrant a certificate of appealability when the "questions are
 7 adequate to deserve encouragement to proceed further." Barefoot v. Estelle, 463 U.S.
 8 880, 893 n. 4 (1983) (citation omitted), superseded on other grounds by 28 U.S.C. §
 9 2253(c)(2). Given the "relatively low" threshold for granting a certificate of
 10 appealability, Jennings v. Woodford, 290 F.3d 1006, 1010 (9th Cir. 2002), and that "the
 11 petitioner need not show that he should prevail on the merits," Lambright v. Stewart,
 12 220 F.3d 1022, 1025 (9th Cir. 2000), quoting Barefoot, 463 U.S. at 893 n.4, the Court
 13 finds Claims 4-9, 12 and 39 suitable for a COA.

14 VII. CONCLUSION

15 For the reasons discussed above, the Court **DENIES** Respondent's request to
 16 dismiss Claims 12, 13, 23, 24, and 33 on the basis of state procedural bars, **DENIES**
 17 Claims 1-8, 10-11, 13-30 and 32-38 on the merits, **DENIES** Claim 31 without prejudice
 18 as premature, **DENIES** Petitioner's request for an evidentiary hearing and/or discovery
 19 on Claims 4-8, 10-11, 25-27 and 29-31 and **GRANTS** the petition for a writ of habeas
 20 corpus on Claims 9, 12, and 39. In the final order, entered contemporaneously with the
 21 present order, the Court **GRANTS** a COA on Claims 4-9, 12 and 39, and **DENIES** a
 22 COA on Claims 1-3, 10-11, and 13-38.

23 **IT IS SO ORDERED.**

24 DATED: December 2, 2015

25 
 26 Hon. Jeffrey T. Miller
 United States District Judge

27 cc: All parties
 28